Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL BRYANT BRUMLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari to the United States Court Of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI VOLUME I

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60 pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C § 1346 (1988) extends the wire fraud statute (18 U.S.C. § 1343) to criminalize misconduct by a state employee in circumstances where the misconduct does not occasion the state, any entity or person a tangible loss or gain and only offends the ethereal concept of honest and impartial government.

2. Whether the Federal Government can or should exercise its jurisdiction to include the prosecution and punishment of state employees whose conduct does not affect interstate commerce — the Tenth Amendment issue.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were defendant-appellant Michael Bryant Brumley (petitioner herein), and plaintiff-appellee the United States (respondent herein).

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PETITION FOR A WRIT OF CERTIORARI

Michael Bryant Brumley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit are reported at: *United States v. Brumley*, 59 F.3d 517 (5th Cir. 1995) (*"Brumley I,"* App. 1a-13a), *withdrawn*, 79 F.3d 1430 (5th Cir. 1996) (*"Brumley II,"* App. 14a-38a), *reh' g en banc granted*, 91 F. 3d 676 (5th Cir. 1996) (App. 39a-40a); and *United States v. Brumley*, 116 F. 3d 728 (5th Cir. 1997) (*"Brumley III,"* App. 41a-84a). These opinions are reprinted at pages 1a-84a of Appendix to this petition. There is no published opinion of the United States District Court for the Eastern District of Texas, the court in which petitioner was convicted and sentenced.

I. PROCEEDINGS BELOW

At bench trial, Michael Bryant Brumley ("Brumley") was convicted and sentenced for 1) conspiracy to defraud State of Texas citizens of their *intangible right to his (Brumley's) honest services* by using interstate wire communications - 24 months; 2) three counts of wire fraud - 24 months on each count; 3) three counts of money laundering - 48 months on each count; and 4) two counts of making a false statement to a financial institution - 24 months on each count.[1] Brumley did not challenge the false statement convictions and simply requested resentencing if, on appeal, the wire fraud and/or money laundering convictions fell.

A panel of the Fifth Circuit Court of Appeals first **reversed** the convictions for wire fraud, and money laundering and conspiracy. *Brumley I*. The panel reversed for lack of evidence that Brumley could foresee the interstate character of the wire transmission relied upon by the government. After withdrawing this opinion, the panel, with one judge dissenting, held that the term "another" as used in 18 U.S.C. § 1346 does not reach citizens of a state or political subdivision who have been deprived of the

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[1]Case No. 1:93CR110-1, in the United States District Court for the Eastern District of Texas, Honorable Richard A. Schell presiding.

honest services of their public officials and **vacated** the convictions. *Brumley II*. The government's petition for rehearing *en banc* was granted on July 17, 1996. *United States v. Brumley*, 91 F. 3d 676 (5th Cir. 1996). On June 18, 1997, the *en banc* Court, with three judges strongly dissenting, **affirmed** all convictions heretofore vacated by the panel. *Brumley III*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 18, 1997. Petitions for rehearing and for reinstatement of the first panel decision were denied on July 23, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue are 18 U.S.C. § 1343, 18 U.S.C. § 1346, and § 36.08, Tex. Penal Code, which are reprinted in the Appendix to this petition at pages 85a through 87a.

STATEMENT

This case presents a State of Texas employee who has been convicted of wire fraud for depriving the citizens of the State of Texas of their intangible right to honest and impartial government.

I. BACKGROUND FACTS.[2]

A. The IAB, Brumley, The Lawyers, And The Loans.

Texas' workers' compensation law was long administered by the Texas Industrial Accident Board ("IAB"). Under this regime the Board dealt with three groups: claimants, their lawyers, and insurance carriers insuring the employers. Brumley worked for the Board and resided in Beaumont, Texas. In 1990, the Texas legislature changed the process for resolving workers' compensation claims. The Board became the Texas

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[2]The record is in excess of 1800 pages and contains over a thousand pages of documentary exhibits. Virtually all factual statements are derived from *Brumley III* (App. 41a-84a) and the Superseding Indictment. A few other significant facts are accompanied by references to the record or exhibits.

Workers' Compensation Commission, and Brumley was promoted to Regional Associate Director of the new commission and moved to the new commission's Houston office. Brumley's duties included the handling of claims arising under the old law and responsibility for "identifying attorneys and insurance carriers who failed to follow TWCC or IAB rules and regulations." Brumley's work gave him knowledge about personal injury claims and unrepresented claimants. The government stipulated that he never used this knowledge to benefit himself or any attorney, and did not claim that Brumley "ran cases" or enhanced awards. R. I, 6-7. App. 88a-90a.

Brumley resided in Beaumont, Texas. In addition to his state job, he owned a commercial cleaning business. In the mid-1980's, Brumley was appointed to the City Planning & Zoning Commission. He was elected to the Beaumont City Council in 1986 and served until 1990. Despite this apparent success, Brumley never was able to live within his income. By 1992 Brumley had borrowed money from at least eleven lawyers with whom he had political, church and social relationships. These lawyers all represented claimants before the IAB.

In the early 1980's, Brumley struck up a personal relationship with John M. Cely, a Lufkin attorney with a substantial workers' compensation practice. Cely made frequent appearances before Brumley in prehearing conferences. In 1987, Brumley advised Cely that he was debt-ridden and needed to borrow money for his business. Cely agreed to help Brumley and began wiring money from the Western Union office in Lufkin to Brumley in Beaumont (and later in Houston). These wire transfers were intrastate, but were recorded by a Western Union facility outside of Texas. *Brumley I*, App. 9a. From 1987 to May of 1992, Cely made some seventy wire transfers to Brumley totaling approximately $86,730. In all, Brumley "borrowed" some $112,156 from various lawyers, including Cely. Brumley defaulted on all the loans.

B. Brumley And Cely — The IAB Investigation And The Lufkin Lease.

1. The IAB investigation.

In 1990, the Texas Industrial Accident Board, in response to a complaint filed by a claimant who had been represented by Cely, began an investigation. The IAB investigation of Cely encompassed all his files over

a two-year period and centered on whether Cely was, without IAB approval, deducting money from his client's portion of settlements and sought to ascertain if Cely was keeping the money later reimbursed by the workers' compensation carrier. In the claim giving rise to the Cely investigation, Brumley was the IAB officer who did not approve Cely's request to deduct certain expenses. Brumley's position gave him the power to initially approve any deduction or to quickly end the IAB's investigation of Cely by retroactively approving the deduction in question, yet he did neither. The IAB audit ultimately revealed no theft and that Cely had merely recouped his out of pocket expenses immediately and later on reimbursed the client when the workers' compensation insurance carrier reimbursed him. R. IX, 569. Cely was given the minimal 30-day suspension by the IAB for technical violations of IAB rules. Gov. Ex. 45A.

In the context of this IAB investigation, Brumley 1) vouched for Cely's good character, and 2) advised Cely to alter documents. *En banc* Opinion, App. 55a. Brumley and Cely were close friends and Brumley did vouch for his character; however, the government's only witness from the Lufkin area confirmed that at the time Brumley vouched for Cely's character Cely did have a good reputation. R. IX, 915. After he vouched for Cely, Brumley was shown proof of Cely's unauthorized deduction by IAB Board Chairman Bobby Barnes and said nothing further on Cely's behalf. R. IX, 663-669. Brumley's advice that Cely make sure his records disclosed that the claimant was fully reimbursed was part of Brumley's job function. Cely only altered his own records. R. XIII, 1427. Government exhibit 143 is an example of an "alteration." App. 92a-93a.

2. The lease.

In 1991, Brumley and Cely openly discussed the Texas Workers' Compensation Commission's (TWCC) plan to lease property in Lufkin, Texas. These lease specifications were open to public bid and had long been on public record. Cely never submitted a bid to lease the property on behalf of himself or any client. Brumley never made any recommendations that any property be leased from Cely or any of Cely's clients. The state employee in charge of leasing the property had no communication with Cely or Cely's client and did not state that Brumley interfered with or affected any lease negotiations. R. VIII, 384-385; IX, 420.

C. The Indictment Alleges No *Quid Pro Quo* Or Hobbs Act[3] Conduct.

The Superseding Indictment does not allege bribery. Although the original indictment alleged Hobbs Act violations, the Superseding Indictment dropped the Hobbs Act count after the government interviewed Cely and the other attorneys. R. X, 742.

In part, the Superseding Indictment alleged:

> "During the period of 1987 through 1992, Brumley showed favoritism to Cely in the manner in which Cely's cases were handled ..." (pg. 15, ¶23)
>
> "It was a further part of the scheme for Brumley to use his official position as a State employee to attempt to provide favoritism to Cely ..." (pg. 20, ¶6)
>
> "On or about a date in 1982 and continuing until on or about a date in June of 1992, in the Eastern District of Texas and elsewhere, the Defendant, Michael Bryant Brumley, having intentionally and willfully devised the scheme and artifice described in Paragraphs A-1 through 23 and B-1 through 30, to defraud and deprive the citizens of the State of Texas, including the Industrial Accident Board and its successor (the Texas Workers' Compensation Commission), a State agency, of the intangible right to good, faithful and honest service ..." (pg. 21)

Any analysis of how the Fifth Circuit has construed and applied § 1346 should begin with the indictment's allegations of ethical violations and appearances of favoritism and its failure to allege that any attorney, claimant, insurance carrier, health care provider or bank gained or lost anything.

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[3] 18 U.S.C. § 1951.

II. THE FIFTH CIRCUIT ANALYSIS

> **Rather than construe the statute [mail fraud, § 1341] in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.** *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).
>
> **We held in *McNally* that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government' and that the statute is "limited in scope to the protection of property rights."** *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316, 320, 98 L.Ed.2d. 275 (1987).
>
> **§ 1346. Definition of "scheme or artifice to defraud"**
> **For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services. (Added Pub.L. 100-690, Title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.)** 18 U.S.C. § 1346 (1988).
>
> **We are persuaded that a governmental entity qualifies as "another" within the meaning of § 1346, and that "honest services" can include "honest and impartial government."** *En banc* Opinion, App. 48a.

The Fifth Circuit has simply stated that the enactment of § 1346 removed the limitations *McNally* placed on § 1343. The Court construed the term "another" to include a governmental entity. The Court next construed "honest services" to mean services that a state employee owes under state law. In order for its construction to be self-fulfilling, the Court then construed the term "honest services" to include honest and impartial government. Once "another" is construed to include a governmental entity and the term "honest services" is construed to include honest and impartial [state] government, the wire fraud statute judicially metamorphosizes into a comprehensive anti-corruption statute. The minimalist language of § 1346 then suffices for all the proposed anti-corruption laws which the government desired but which Congress failed to enact in 1989, 1990, 1991, and 1992. That § 1346's innocuous wording provided notice to Brumley in 1992 that his latent conflicts of interest constituted a federal crime is the crux of the Fifth Circuit's decision.

REASONS THAT THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

I. THE FIFTH CIRCUIT COURT OF APPEALS' DECISION THAT § 1346 CRIMINALIZES STATE EMPLOYEE MISCONDUCT IN CIRCUMSTANCES WHERE THE MISCONDUCT ONLY VIOLATES AN ETHICS-BASED MISDEMEANOR STATUTE AND DOES NOT CAUSE THE STATE NOR ANY ENTITY OR PERSON A TANGIBLE OR INTANGIBLE LOSS OR GAIN IS CONTRARY TO THIS COURT'S DECISION IN *MCNALLY V. UNITED STATES*[4] AND CONFLICTS WITH DECISIONS APPLYING § 1346 IN THE FIRST, SECOND, THIRD, FOURTH, EIGHTH, AND ELEVENTH CIRCUITS.

In *McNally*, this Court restricted the application of the wire fraud statute in four areas involving intangible rights.[5] Separate and apart from

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[4]483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).

[5](1) State and federal officials convicted of defrauding citizens of their right to the honest services of their governmental officials (*Footnote 1*, *Id.* at 362, 107 S.Ct. at 2883); (2) Elected officials and campaign workers convicted of mail fraud for using the mail to falsify votes, thus defrauding the citizenry of its right to an honest election (*Footnote 2*, *Id.* at 363, 107 S.Ct. at 2883); (3) In the

its construction of the mail and wire fraud statutes, *McNally* and *Carpenter* reaffirm the principle that this Court has consistently held that criminal statutes be narrowly construed. *Rewis v. United States*, 401 U.S. 808, 812 (1971). In the instant case, the Fifth Circuit has ignored this guiding principle. Rather than restrictively construe § 1346 as only encompassing private sector deprivations of intangible rights occasioned by breaches of fiduciary duties, the Fifth Circuit gives any uncertainty in § 1346's scope an expansive construction. This Court never invited such a construction in *McNally*, nor condoned it in an area so sensitive as the state/federal relationship. *United States v. Bass*, 404 U.S. 336, 339-341, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

The enactment of 18 U.S.C. § 1346 has done nothing to alleviate the pre-*McNally* unevenness occasioned by the various circuits' wrestling with the concept of what constitutes a deprivation of honest services. If § 1346 is a federal anti-corruption statute, it is necessary for this Court and not the various circuits to supply the answers to the following questions: (1) Does § 1346 reach public sector employees? and (2) What type of conduct falls within the scope of a deprivation of honest services? Any unevenness in the circuits is incompatible with the concept of a uniform approach necessary to a federal anti-corruption statute that affects millions of state employees. *United States v. Ruzicka*, 329 U.S. 287 (1948).

The instant case gives this Court a singular opportunity to address the concept of a federally enacted statute criminalizing the deprivation of honest services because it is not attenuated with bribery or Hobbs Act allegations and presents conduct on the cusp of constitutional questions concerning the Eighth, Ninth, and Tenth Amendments.

A. 18 U.S.C. § 1346 Was Not Invited And Should Fall.

McNally did not invite an amendment to the wire fraud statute. *McNally* indicated that in order criminalize the deprivation of solely ethereal rights, a specifically dedicated statute was necessary. If the instant

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private sector, agents with clear fiduciary duty to their employers or unions, found guilty of defrauding by accepting kick backs or selling confidential information (*Footnote 3*, *Id.* at 363, 107 S.Ct. at 2883); and (4) In the private sector, defendants convicted for defrauding individuals of their rights to privacy and other non-monetary rights (*Footnote 4*, *Id.* at 364, 107 S.Ct. at 2884).

case presented corruption, it was in the form of bribery or Hobbs Act and it did not need to be predicated upon the deprivation of any ethereal right. *Carpenter*'s extension of the wire fraud statute to the concept of intangible property rights reaches the outer limits of what is commonly understood as fraud. In enacting § 1346, Congress solved no post-*Carpenter* problems concerning the concept of honest services. By requiring more than mere proof of a violation of an underlying state law, the First Circuit has construed § 1346 no differently than this Court construed the wire and mail fraud statutes in *Carpenter*. *United States v. Sawyer*, 85 F.3d 713, 728-729 (1st Cir. 1996). In *Brumley*, the Fifth Circuit construed honest services as services owed by reason of state law thereby creating a different version of § 1346 for each state. *En banc* Opinion, App. 55a. This is not the dedicated statute championed by proponents of federal anti-corruption legislation, but a return to the *ad hoc* approach contra-indicated in *McNally*. Brumley urges that in light of *Carpenter* § 1346's literal ambiguity renders it a useless appendage to the mail and wire fraud statutes. As applied by the Fifth Circuit, § 1346 should be struck down because it does not respond to *McNally*'s requirement for a clearly dedicated anti-corruption statute criminalizing the deprivation of a citizen's ethereal right to honest and impartial state government. *See* S.2793, App. 79a-84a.

B. "... To Deprive *Another*" — The Rule Of Lenity.

In order to make § 1346 applicable to the public sector, the Fifth Circuit reasoned "another" could include a governmental entity by deducing that 1 U.S.C. § 1's failure to specifically exclude such construction allows for "another" to be so construed. More than pervert, the Fifth Circuit's deduction actually subverts the rule of lenity because it forsakes the literal and commonly understood limitations of the term "another" in favor of a meaning which may be inferred; and thereby finds that the term "another" is not ambiguous. Had § 1346 provided, "*For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice resulting in any deprivations of the intangible right of honest services*," the problems presented in extending the statute to include the public sector would be diminished. As enacted, the statute did contain the word "another" and as such should be construed to reflect the limitations commonly associated with the term. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Fifth Circuit did not actually construe "another," it merely stated it was construing "another" and construed the statute as if the

term "another" had not been included in the wording. *McNally* was a statutory construction case guided by the rule of lenity. Had this Court in *McNally* applied the rule of lenity in the manner that the Fifth Circuit applied the rule of lenity in *Brumley*, Mr. McNally would have gone to prison.

C. The "Appearance Of A Conflict Of Interest" Is Not Dishonest Service.

The Court of Appeals next construes "honest services" to encompass the indictment's allegation of "favoritism." The Court of Appeals reasoned that honest services can include the appearance of "impartial" government and that "favoritism" is not "impartial" government. A state employee whose conduct has the appearance of a conflict of interest in contravention of a state ethics statute thusly deprives the citizens of their ethereal right to the appearance of honest government. By so finding, the Court of Appeals recognizes that it is confronting an ill-defined concept and attempts to create a proviso so that its construction avoids due process notice requirements occasioned by § 1346's ambiguous language. The proviso employed by the Fifth Circuit is that under § 1346 a state law predicate violation must necessarily attach to the federal jurisdictional aspect. This construction is remarkable in its audacity because it creates a totally unintended and unforeseeable consequence to state conflict of interest laws. That this unintended and unforeseeable consequence goes to the essence of federalism by preempting state criminal punishments is without concern. The result is that the Fifth Circuit Court of Appeals has accomplished what neither Congress nor any state legislature ever even contemplated — enact an anti-corruption statute that makes it a federal felony for a state employee's conduct not to appear to be impartial or to have the appearance of a conflict of interest. This directly conflicts with *United States v. Sawyer* and is devoid of pre-*McNally* precedent.[6]

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[6]Historically, the honest service doctrine was applied to a variety of bribery and kickback schemes involving public officials. *See, e.g., United States v. Silvano*, 812 F.2d 754 (1st Cir. 1987) (city budget director); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (party leader), *reh. denied*, 811 F.2d 46 (1982); *United States v. Barber*, 668 F.2d 778 (4th Cir. 1982) (state commissioner), *cert. denied*, 459 U.S. 829, 103 S.Ct. 66 (1982); *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987) (judge); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976) (city building commissioner). These pre-*McNally* cases

D. § 1346 Has No Legislative History - Is The Dissent Correct?

The significance of § 1346's lack of legislative history is that any ambiguity in a statute can, in some cases, be resolved with the benefit of pre-enactment legislative intent. Section 1346 does not have the benefit of any legislative history and leaves the various circuits to struggle with the ambiguities occasioned by the inclusion of the term "another;" its failure to contain any specific reference to "states" or "state citizens;" and its lack of statutory definitions for the terms "honest," "services," or "honest services." In the case of a criminal statute which the Supreme Court has previously held does not extend to or reach conduct which Congress may want to make criminal, the burden is on Congress to enact a statute that (i) "speaks more clearly than it has" (*McNally*); (ii) "gives fair warning to the world in language that the common world will understand" that a crime will be committed if a certain line is passed (*Bass*); and (iii) in the area of "the sensitive relation between federal and state criminal jurisdiction," the language makes a "clear statement" which "assures that the legislature has in fact faced ... the critical matters involved" (*Bass*). None of the above is evidenced in § 1346. The Fifth Circuit's holding that § 1346 satisfies the foregoing requirements is without any support in the statute's legislative history because the statute has no legislative history. Subsequent efforts by Congress to pass a dedicated anti-corruption statute are fully discussed by the sharply worded dissent. App. 56a-78a. If § 1346 is what the Fifth Circuit says it is in *Brumley III*, Congress and the government also were on notice of § 1346's reach thereby depriving us of their honest services when they attempted to pass the same law in 1989, 1990, 1991, and 1992 which they now claim was clearly enacted in 1988. If Congress' and the government's subsequent efforts indicate that § 1346 does not have the reach attributed to it by the Fifth Circuit, then this petition should be granted.

E. Acceptance Of A Benefit Is A Lesser Included Offense Of Bribery.

The distinction between ethical misconduct and criminal misconduct is critical to analyzing how the Fifth Circuit erroneously construed and applied § 1346. Ethical codes address conduct by its outward perception.

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limit the honest service doctrine to situations where there is a clear example of *quid pro quo* conduct.

Criminal laws address conduct by its internal motivation — *mens rea*. Without proof of a corrupt intent a state employee's acceptance of loans cannot constitute bribery, but is sufficient to constitute a violation of § 36.08(e) of the Texas Penal Code because the misdemeanor statute focuses on the perception of the conduct. Unlike the Hobbs Act or state bribery statute, the Texas misdemeanor statute requires no fraudulent *mens rea*. This law is part of Title 8 of the Texas Penal Code and deals with offenses against public administration. The relevant portion of § 36.08(e), Tex. Penal Code, provides:

> A public servant who has judicial or administrative authority, who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decision, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.

The Fifth Circuit denies a state employee due process when it dispenses with the distinction between acceptance of a benefit and bribery. The Fifth Circuit's finding that "in exchange for money Brumley used his position" ignores the trial court's finding that Brumley violated § 36.08, Tex. Penal Code.[7] The indictment did not allege and the trial court did not find (and could not find, *United States v. Sutherland*, 665 F.2d 1181, 1189 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982)) that Brumley violated the Texas bribery statute.[8] Section 36.08(e) is a lesser included offense to the bribery statute. *Hubbard v. State*, 668 S.W.2d 419

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[7]Brumley received approximately $86,000 from Cely. Persons familiar with Brumley's IAB duties would know that to characterize this as a bribe would be analogous to giving $5,000 to a meter maid to void a $10 parking ticket. The only "power" Brumley had was to enhance awards or to "run cases," and the government stipulated that this did not occur.

[8]The trial court did, however, state "that there existed and developed a conspiracy in the form of a tacit agreement or understanding between the two defendants that in return for the wire transfers, which cannot under the circumstances be construed as loans, Brumley would use his position to help and protect Cely." R. XVI, 13. The trial court's statement is irreconcilable with the indictment or with its finding that Brumley violated § 36.08(e), Tex. Penal Code.

(App. 5th Dist., 1984), *review granted, rev'd on other grounds*. The Court of Appeals is convicting a state employee of wire fraud predicated upon bribery in circumstances where the indictment specifically charged him with conduct that only violated § 36.08(e), Tex. Penal Code. The distinction is critical because under Texas law a violation of § 36.08(e) is a misdemeanor that requires no corrupt intent.

The trial court's finding that Brumley violated § 36.08(e) precludes Brumley's conduct from being characterized as bribery because it convicts him of the lesser included offense of accepting a benefit and by doing so acquits him of bribery. This is the only finding compatible with the indictment. *Hubbard v. State, supra*. Brumley's convictions for wire fraud and money laundering directly conflict with the First Circuit's holding that, "a violation of state law that prohibits only appearances of corruption will not alone support a violation of §§ 1343 and 1346. *United States v. Sawyer* at 728-29.

F. Neither The Trial Court Nor The Court Of Appeals Can Amend The Indictment— The Variance Issue.[9]

The Court of Appeals having first deconstructed the literal language of the statute to reach Brumley's status next reconstructs the language of the indictment to criminalize Brumley's conduct. The Court of Appeals recognized that a violation of a state law that prohibits the appearance of corruption may not alone support a § 1346 conviction. *En banc* Opinion, App. 53a (acknowledging *United States v. Sawyer* at 728-729). The Court of Appeals circumvents the signal language of the First Circuit in *Sawyer* and erroneously finds that, "Brumley, in exchange for money, used his position to assist Cely." The Court of Appeals has thus construed the indictment to charge bribery in order to create a means to facilitate its finding that Brumley did more than merely violate a less significant law than *Sawyer* presented. *En banc* Opinion, App. 54a. This post-trial construction of the indictment is erroneous because it offends traditional due process requirements of notice. The matters heretofore raised in *Brumley I*, *Brumley II*, and *Brumley III* are without moment if the Court of Appeals amends the indictment to charge bribery. Brumley need not

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[9]The variance issue surfaced for the first time in the Fifth Circuit's *en banc* decision. Throughout this prosecution Brumley repeatedly challenged the "bribery and Hobbs Act" deficiency in the indictment.

belabor the wealth of judicial precedent to the effect that the Court of Appeals cannot constructively amend the indictment. *United States v. Powell*, 423 U.S. 87 (1975). In this case, the indictment specifically gave notice that Brumley was being charged only with the appearance of conflicts of interest and violating § 36.08(e) of the Texas Penal Code. The indictment never uses the word "exchange" and gives no hint of bribery. When the government dropped the Hobbs Act count in the Superseding Indictment, Brumley waived a jury and contested only the allegations of conflicts of interest and money laundering because he was only on notice for conduct constituting misdemeanor ethics violations. Had Brumley been put on notice that his ambitious accusers were alleging bribery rather than conflicts of interest, he would not have waived a jury and he would have defended this case on the basis that there is absolutely no connection between the money that he borrowed from personal friends and the type of services that he dispensed as part of his job duties. This Court has never allowed a conviction to be affirmed on grounds outside the scope of the indictment or proof. *See, e.g., Cole v. Arkansas*, 333 U.S. 196 (1948) (reversing conviction because appellate court affirmed on grounds outside the scope of the indictment); *McCormick v. United States*, 500 U.S. 257 (1991) (reversing appellate court's affirmance of a Hobbs Act conviction because court of appeals' theory exceeded the scope of the indictment). The variance question is accentuated by this Court's holding that a passive acceptance of a benefit is sufficient to form the basis of a Hobbs Act conviction. *Evans v. United States*, 504 U.S. 255 (1992). By dropping the Hobbs Act count the government gave Brumley the security that he was only accused of violating a state conflict of interest misdemeanor statute. This security was wrongfully taken away by the *en banc* decision of the Fifth Circuit Court of Appeals.

G. The Conflict Among The Circuits Should Be Resolved.

Post-§ 1346 decisions continue the pre-*McNally* trend of inconsistently defining what constitutes a deprivation of honest services under the mail and wire fraud statutes. Brumley's case gives this Court the opportunity to address all aspects of the honest service conundrum and resolve the conflict of circuits.

1. The First Circuit.

The First Circuit's construction of § 1346 is in conflict with the Fifth Circuit and would deem the appearance of a conflict of interest and

concomitant misdemeanor ethics violation insufficient to constitute a deprivation of honest services conviction under § 1346. *United States v. Sawyer*, *supra*; *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (reversing convictions under §§ 1343 and 1346 because although unauthorized browsing of taxpayer files by an IRS employee constitutes a breach of personnel policies, "there [was] no suggestion that he failed to carry out his official tasks adequately, or intended to do so").

2. The Eighth Circuit.

In applying the law to the instant facts, the Fifth Circuit references Brumley's aid to Cely in the context of an IAB investigation and an IAB lease. Neither of these IAB functions were directly or indirectly under Brumley's control. In the IAB investigation of Cely, Brumley, in his capacity as administrative judge, ruled against Cely in the matter of deductions. In the matter of the IAB lease, the record is clear that Brumley had no authority whatsoever to consummate the lease or to make any recommendations concerning the lease. Pre-*McNally* and presumably post § 1346 law in the Eighth Circuit would conflict in principle with the Fifth Circuit's application of § 1346 because Brumley's official capacity did not give him control over the investigation or the lease. *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). Other than his loan arrangements, Brumley's work was exemplary. Under these circumstances, the Eighth Circuit would find that there was no deprivation of honest services because a citizen's right to these services is limited to the state employee's job performance. *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976).

3. Other Circuits.

Recent § 1346 case law in the other circuits unanimously present the derogation of at least an intangible property right and go on to encompass conduct which even includes bribery. *United States v. Castro*, 89 F.3d 1443 (11th Cir. 1996) (bribery); *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996) (self dealing concerning concession rights); *United States v. Bryan*, 58 F.3d 933, 940 n.1 (4th Cir. 1995) (state lottery director profiting off insider information); *United States v. Waymer*, 55 F.3d 564, 568 n.3 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1350 (1996) (member of state board profiting from private sector contract with state board); *United States v. Alkens*, 925 F.2d 541, 548 (2d Cir. 1991) (Department of Motor Vehicles employees selling vehicle certificates); and

United States v. Martinez, 905 F.2d 709, 715 (3d Cir.), *cert. denied*, 498 U.S. 1017 (1990) (state employee fraudulently procuring a medical license). The minimal thrust of these cases indicate some degree of job related self dealing resulting in a profit is required to violate § 1346. *Brumley* does not even register on the deprivation scale presented by these cases and as such stands apart and conflicts in principle with this ever-increasing body of § 1346 law because Brumley's conduct was outside the scope of his state duties and offended only an ethereal right related to the "appearance" of government.

The conflicts in principle between the enumerated circuits and the Fifth Circuit stem from the questions raised by § 1346's literal wording: Can the mail and wire fraud statutes criminalize conduct which only offends the concept of a citizen's ethereal right to have his state government appear free of conflicts of interest and, if so, does the Tenth Amendment provide a clear line of demarcation beyond which § 1346's reach is constitutionally prohibited? Until this Court answers these questions, conflicts among the circuits will continue due to § 1346's nebulous language.

II. THE FIFTH CIRCUIT COURT OF APPEALS' DECISION THAT § 1346 CRIMINALIZES THE MISCONDUCT BY A STATE EMPLOYEE IN CIRCUMSTANCES WHERE THE MISCONDUCT DOES NOT CAUSE THE STATE NOR ANY ENTITY OR PERSON A TANGIBLE OR INTANGIBLE LOSS OR GAIN IS INCONSISTENT WITH THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IS CONTRARY TO THIS COURT'S ANALYSIS OF CONGRESS' COMMERCE CLAUSE POWER IN *UNITED STATES V. LOPEZ*.[10]

A. The Tenth Amendment.

> **The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.** Amend. 10, U.S. Constitution.

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[10]115 S.Ct. 1624 (1995).

> **"The tension inherent in federal criminalization of conduct by state officials innocent under state law is absent here."**
> *En banc* Opinion, App. 55a.

The Fifth Circuit errs in finding no tension in their decision. This case is fraught with tension caused by unintended and disparate punishment by the Federal Government for purely state-related conduct. This was a selective prosecution wherein a federal prosecutor chose to federalize misdemeanor conduct by virtue of an uninvolved third party's incidental use of interstate wires.[11] Brumley's employee file disclosed him to be an exemplary worker. Thousands of pages of exhibits disclose that Cely did not steal any money or derive an unfair gain from any workers' compensation case involving Brumley. The proof shows only that Brumley failed his employer solely by his "acceptance of benefits" and his failure to disclose the loans from the various attorneys. For this conduct, the State of Texas had in place the following punishment: 1) Brumley could be subject to a misdemeanor; and 2) Brumley could be terminated from his job. Instead of this contemplated and clearly apparent penalty, the Court of Appeals' decision will result in Brumley being sentenced to 48 months in a Federal penitentiary.

If Brumley is a criminal, he is a criminal only to the extent that the appearance of his conduct was unacceptable to the State of Texas as his employer. Since his employer was a sovereign it had the inherent power to criminalize his conduct; and, as his sovereign and by virtue of the Tenth Amendment, it should have the sole remedy for this "victimless" ethics crime. There is no supreme reason for the Federal Government to levy extraordinary federal punishment on a person whose crime is defined solely by a state and pertains only to employees of that state in a situation where no citizen of any state has been adversely affected. *United States v. Constantine*, 296 U.S. 223 (1935).

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[11]The instant case suggests that this Court should reconsider the reach of the wire fraud statute at least insofar as it utilizes § 1346. In order to trigger federal jurisdiction in § 1346 cases, circumstances should disclose wire fraud and not fraud and incidental use of the wires. *See*, Scalia, J. dissenting, *Schmuck v. United States*, 489 U.S. 705, 722-723 (1989).

B. *United States v. Lopez.*

In 1995, this Court struck down 18 U.S.C. § 922(g) (the Gun Free School Zone Act) on the grounds that the statute constituted an unconstitutional extension of Congress' Commerce Clause authority. *United States v. Lopez*, 115 S.Ct. 1624 (1995). In *Lopez*, the Court reasoned that a fundamental component of the statute failed to substantially affect interstate commerce. *Lopez* at 1933. Even though § 1346 contains a jurisdictional element, honest services-premised prosecutions of state officials pursuant to § 1346 are within *Lopez*'s rationale. This Court, in *Lopez*, held that Congress' Commerce Clause authority creates three avenues by which the authority may be utilized. In identifying when Congress may utilize its power under the Commerce Clause, the *Lopez* court stated:

> Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power ... First, Congress may regulate the use of the channels of interstate commerce ... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from intrastate activities ... Finally, Congress' commerce authority includes the power to regulate those activities having substantial relation to interstate commerce.

Lopez, 115 S.Ct. at 1629-30. The court concluded that within the final category the "proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 1630.

Brumley now brings to this Court a Commerce Clause-based criminal statute more far reaching than the Gun Free School Zone Act. In *Brumley*, § 1346 comes to this Court heretofore without, but direly needing, the constitutional scrutiny afforded 18 U.S.C. § 922 in *Lopez*. A *Lopez*-centered analysis of *Brumley* would: 1) Reveal that the evidence was legally insufficient to prove that Brumley could foresee the interstate character of the wire transmission relied upon by the government (*Brumley I*); 2) Reveal that Brumley's case does not involve the regulation or protection of any instrumentalities in interstate commerce; and 3) Question whether Brumley's conduct had <u>any</u> affect on interstate commerce.

In *Lopez*, this Court concluded that within this important third avenue the proper test requires a case by case analysis of whether the activity in question substantially affects interstate commerce. The government's conviction in *Brumley* is not based on any economic loss nor does it establish any impact on interstate commerce other than microscopically revealing a happenstance wire transfer. More importantly, the government attempts to use § 1346 in circumstances where it did not charge and could not prove bribery or Hobbs Act. This is inconsistent with *Lopez*. Brumley's central issue is and has always been that his services were correct and proper and there was absolutely no proof that one person gained or lost any tangible or intangible right as a result of his work.[12] There is no way to reconcile the government's failure to prove any loss to anybody with the *Lopez* requirement that the conduct criminalized under the Commerce Clause must have some substantial affect on interstate commerce.

C. And The Eighth Amendment.

> **... nor cruel and unusual punishments inflicted.** Amend. 8, U.S. Constitution.

The punishment mandated by the Sentencing Guidelines usurps the State of Texas' sole right to punish and its citizens' sole right to be punished by the state in circumstances where the criminal conduct results solely from a breach of an ethical duty by a state employee to the state. Brumley's punishment is cruel and unusual, and goes far beyond anything contemplated by the State of Texas; as such, it violates the Eighth Amendment.

D. And Even The Ninth Amendment.

> **The enumeration in the Construction, of certain rights, shall not be construed to deny or disparage others retained by the people.** Amend. 9, U.S. Constitution.

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[12]Brumley attempted to offer into evidence the personnel files of three other TWCC Associate Regional Directors in order to show that Brumley's work was exemplary in comparison to the other IAB employees in like positions. The trial court sustained the government's objection on grounds of relevancy. R. XV, 1636-1640.

There is no specific power enumerated by the Constitution which allows it to punish the citizen of a state more severely than the state contemplated if that citizen has not directly or indirectly harmed or intruded upon any aspect of the Federal Government. The Federal Government should not disparage Brumley's right to be punished solely under the laws of his state for conduct which occurred exclusively within the provence of his state and offended only his legal duty to his state.

SUMMARY

McNally limited the scope of the mail and wire fraud statutes. To a certain extent, *McNally* heeded Judge Winter's influential dissent criticizing the apparent limitless application of these statutes. *United States v. Margiotta*, 688 F.2d 108, 139-144 (2d Cir. 1982), *reh. denied*, 811 F.2d 46 (1982). *Carpenter*'s subsequent recognition that the wire fraud statute reaches intangible property rights allows the concept of fraud under the mail fraud and wire fraud statutes to extend to its commonly understood limit. This Court need only look to its decisions in *Bass*, *Ashcroft*, and *Lopez* in order to strike down § 1346's application to purely ethereal right. In doing so, no harm should occur to the Federal Government's anti-corruption efforts because in *Carpenter* this Court has construed the wire fraud statute to reach any scheme involving tangible or intangible property. A citizen's ethereal right to have his state government appear correct should, by virtue of the internal limitations of the wire fraud statute and the external limitation of the Tenth Amendment, be left solely to the states.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Michael Bryant BRUMLEY,
Defendant-Appellant,

No. 94-40560.

United States Court of Appeals,
Fifth Circuit.

July 18, 1995.

Defendant was convicted after bench trial of wire fraud, money laundering, and conspiracy to commit mail fraud and wire fraud by the United States District Court for the Eastern District of Texas, Richard A. Schell, Chief Judge. Defendant appealed. The Court of Appeals, DeMoss, Circuit Judge, held that: (1) evidence was insufficient to support wire fraud conviction; (2) evidence was insufficient to support conspiracy to commit mail fraud and wire fraud conviction; and (3) evidence was insufficient to support money laundering conviction.

Reversed in part and affirmed in part.

1. Telecommunications Key 362

Essential elements of wire fraud are scheme to defraud, and use of, or causing use of, interstate wire communications to execute scheme. 18 U.S.C.A. § 1343.

2. Statutes Key 223.2(8)

Wire fraud statute and mail fraud statute are in pari materia, that is, they are to be read together, as wire fraud statute was patterned

after mail fraud statute; thus, cases construing mail fraud statute are applicable to wire fraud. 18 U.S.C.A. §§ 1341, 1343.

3. Telecommunications Key 362

In order to prove that defendant has used or caused the use of interstate wire communications, for purposes of prosecution for wire fraud, government must show that defendant knew, or that it was foreseeable to him that, interstate wire communication would result. 18 U.S.C.A. § 1343.

4. Telecommunications Key 362

In order for wire fraud conviction to stand, it must be foreseeable to defendant that his action will result in interstate wire communication. 18 U.S.C.A. § 1343.

5. Telecommunications Key 362

When defendant in one state calls someone whom he knows is in another state, interstate wire communication was clearly foreseeable for purposes of wire fraud prosecution. 18 U.S.C.A. § 1343.

6. Telecommunications Key 362

Government must show that it was foreseeable to defendant that his actions would cause interstate wire communication, in wire fraud prosecution, where individual does not personally communicate, but instead causes another to communicate via interstate wires, as foreseeability is not necessarily readily apparent. 18 U.S.C.A. § 1343.

7. Telecommunications Key 363

Evidence was insufficient to convict defendant of wire fraud; trier of fact could not have found beyond reasonable doubt that it was foreseeable to defendant or unindicted coconspirator that their actions would cause interstate wire communications. 18 U.S.C.A. § 1343.

8. Criminal Law Key 260.11(4)

In bench trial, standard of review is substantial evidence test.

9. Criminal Law Key 1044.1(7)

Defendant preserved error on his claim that evidence was insufficient to convict him of wire fraud, where he moved for directed verdict at close of government's case, which was also close of evidence. 18 U.S.C.A. § 1343.

10. Conspiracy Key 41

If one conspirator makes wire communication to execute scheme, then all conspirators are liable for wire fraud. 18 U.S.C.A. § 1343.

11. Telecommunications Key 362

In determining knowledge and foreseeability relative to defendant, for purposes of wire fraud prosecution, court also had to consider whether interstate wire communication was foreseeable to unindicted coconspirator, even though coconspirator was not indicted, where indictment charged that conspiracy was between defendant and unindicted coconspirator. 18 U.S.C.A. § 1343.

12. Conspiracy Key 47(5)

Evidence was insufficient to convict defendant of conspiracy to commit mail fraud and wire fraud; evidence did not prove that use of interstate wire communications or mails was foreseeable, and thus was insufficient to prove that defendant intended to commit mail fraud and wire fraud. 18 U.S.C.A. § 371.

13. Conspiracy Key 32

Essential elements of conspiracy to commit mail fraud and wire fraud are: agreement between two or more persons; to commit interstate mail fraud or wire fraud; and overt act committed by one of conspirators in furtherance of conspiracy. 18 U.S.C.A. § 371.

14. Telecommunications Key 362

Specific intent to use interstate wires is not required for wire fraud conviction; interstate wire communication need only be foreseeable. 18 U.S.C.A. § 1343.

15. Postal Service Key 35(6)

For mail fraud conviction, use of mails need only be foreseeable. 18 U.S.C.A. § 1341.

16. Conspiracy Key 32

Government's burden, in prosecution for conspiracy to commit mail fraud and wire fraud, is to demonstrate beyond reasonable doubt that defendant agreed to engage in scheme to defraud in which use of mail and interstate wire communications was at least foreseeable. 18 U.S.C.A. § 371.

17. Postal Service Key 49(11)

Evidence was insufficient to support defendant's conviction for mail fraud; rational trier of fact could not have determined beyond reasonable doubt that it was foreseeable to defendant that mails would be used to execute scheme. 18 U.S.C.A. § 1341.

18. Telecommunications Key 363

Evidence was insufficient to support defendant's convictions of money laundering based on underlying specified unlawful activity of wire fraud; evidence was insufficient to support wire fraud conviction. 18 U.S.C.A. §§ 1343, 1956.

George Michael Jamail, Bernsen, Jamail, Hartley & Goodson, Beaumont, TX, for appellant.

Traci L. Kenner, Carol K. Johnson, L. Stuart Platt, Asst. U.S. Attys, Tyler, TX, Mike Bradford, U.S. Atty., Beaumont, TX, for appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before WOOD,[1] JOLLY and DeMOSS, Circuit Judges.

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1. Circuit Judge of the Seventh Circuit, sitting by designation.

DeMOSS, Circuit Judge.

Michael Brumley appeals his conviction at a bench trial on three counts of wire fraud, three counts of money laundering and one count of conspiracy to commit mail fraud and wire fraud. Brumley does not appeal his conviction on two counts of making false statements to a financial institution, but he appeals his sentence. Finding that there was insufficient evidence to convict Brumley of wire fraud, money laundering and conspiracy to commit mail fraud and wire fraud, we REVERSE. Brumley's sentence of twenty-four months for two counts of making false statements to a financial institution is AFFIRMED.

BACKGROUND

Brumley began working for the Texas Industrial Accident Board (IAB) in July, 1976, as a pre-hearing examiner. In July 1988 he was promoted to the position of regional director for the Houston area. As part of the state's new workers' compensation law, the IAB was reorganized in 1990 as the Texas Workers' Compensation Commission (TWCC) and Brumley was appointed the TWCC's regional associate director (essentially the same position he had held with the IAB). Beginning in 1982, Brumley solicited and accepted approximately $40,000 in loans from local attorneys, which he admitted was a violation of IAB ethical guidelines.

Between 1987 and 1992, Brumley also accepted over $86,000 in "loans" via wire transfers from another local attorney, John Cely. Although Cely understood that the money would never be repaid, he continued to make loans to Brumley. Cely wired the money from the Western Union office in Lufkin, Texas, to Brumley in Beaumont, Texas.

The procedure for making the Western Union wire transfers involved Cely, or one of his employees, filling out a form listing the

recipient and the amount of the transfer. Cely paid for the wire transfer with checks payable to H.C. Walker, the Lufkin Western Union franchisee. The Western Union agent, then, through a personal computer, dialed into Western Union's main computer in Bridgeton, Missouri. The Western Union agent would write a unique ten-digit number, which he obtained through the computer in Missouri, on the back of the form he gave to Cely. This would serve as the receipt. Brumley was then immediately able to pick up the money.

After being notified that a money transfer was waiting for him, Brumley would go to a Western Union office in Beaumont to pick up the transfer. He would fill out a form identifying himself as the recipient and the Beaumont Western Union agent would call the Western Union computer in Bridgeton, Missouri, to verify the information. Brumley was then given a check for the amount of the transfer, which he would cash at either a bank or a grocery store.

In 1988, pursuant to a complaint from one of Cely's clients, the IAB began an investigation into Cely's law practice. Brumley on several occasions urged the IAB to reconsider its decision to formally investigate Cely, and Brumley assisted Cely in altering subpoenaed documents. Finally, Brumley aided Cely's efforts to lease TWCC property in Lufkin. The lease, if it had been consummated, would have violated ethical guidelines, as Cely practiced before the TWCC. Nevertheless, Brumley directed that the building specifications be faxed to Cely's office in the name of one of Cely's clients, James Fredregill. A TWCC employee later mailed the lease specifications to Fredregill. The property was ultimately leased to a disinterested party.

Michael Brumley was indicted in November 1993 for conspiracy to defraud the citizens of the state of Texas of the honest use of his services via mail and wire communications (18 U.S.C. § 371), wire fraud (18 U.S.C. §§ 1343, 1346), money laundering 18 U.S.C. § 1956) and making false statements to a financial institution (18 U.S.C. § 1014).

At the conclusion of the bench trial, the district court convicted Brumley on all nine counts in the indictment and he was sentenced to forty-eight months in prison.[2] Brumley now appeals.

WIRE FRAUD

[1-3] The essential elements of wire fraud, 18 U.S.C. § 1343[3], are: (1) a scheme to defraud and (2) the use of, or causing the use of, interstate wire communications to execute the scheme. *United States v. Faulkner,* 17 F.3d 745, 771 (5th Cir.1994), *cert. denied, —U.S.—,* 115 S.Ct. 193, 130 L.Ed.2d 125 (1995); *United States v. Herron,* 825 F.2d 50,54 (5th Cir.1987).[4] In order to prove that a defendant has used, or caused the use of, interstate wire communications, the government must show that the defendant knew, or that it was foreseeable to him that, an interstate wire communication would result. "Where one does an act with the knowledge that the use of the [interstate wires] will

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2. Brumley was sentenced to twenty-four months in prison for each of the two counts of making false statements to a financial institution, to be served concurrently. Brumley does not appeal those convictions (they are the only ones we do not reverse). Brumley does, however, challenge his sentence.

3. 18 U.S.C. § 1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false of fraudulent pretenses, representations, or promises, *transmits or causes to be transmitted* by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. (emphasis added).

4. The mail fraud. 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343, statutes are nearly identical, with the main difference being whether the fraud involves the mails of interstate wires. Because the wire fraud statute was patterned after the mail fraud statute, the two are *in pari materia,* that is, they are to be read together. Therefore, cases construing the mail fraud statute are applicable to wire fraud. *United States v. Donahue,* 539 F.2d 1131, 1135 (8th Cir. 1976); *United States v. Louderman,* 576 F.2d 1383, 1387 n. 3 (9th Cir. 1978); *United States v. Computer Sciences Corp., 689 F.2d 1181, 1188 n. 14 (4th Cir.1982); United States v. Lemire,* 720 F.2d 1327, 1334 n. 6 (D.C.Cir.1983), *cert. denied,* 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 874 (1984); *United States v. Fermin Castillo,* 829 F.2d 1194, 1198 (2st Cir. 1987).

follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the [interstate wires] to be used." *Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954).

[4-6] In order for a wire fraud conviction to stand, then, it must be foreseeable to the defendant that his actions will result in an interstate wire communication. When a defendant in one state calls someone whom he knows is in another state, an interstate wire communication is clearly foreseeable. However, when the individual does not personally communicate, but instead causes *another* to communicate via interstate wires, foreseeability is not always so readily apparent. In such a case, therefore, the government must show that it was foreseeable to the defendant that his actions would cause an interstate wire communication. *United States v. Maze*, 414 U.S. 395, 399, 94 S.Ct. 645, 648, 38 L.Ed.2d 603 (1974); *Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 362-63, 98 L.Ed. 435 (1954).[5]

[7-9] On appeal, Brumley argues that the evidence was insufficient to convict him of wire fraud, as there was insufficient evidence that he *caused* the interstate wire communication.[6] We agree. In

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5. Two other circuits have held that the foreseeability of the interstate nature of the wire communication is irrelevant (at least where the defendant actually makes the communication). *United States v. Bryant*, 766 F.2d 370, 375 (8th Cir.1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986); *United States v. Blassingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 402 U.S. 945, 91 S.Ct. 1629, 29 L.Ed.2d 114 (1971). However, these cases are contrary to our existing precedent, which requires foreseeability. *United States v. Duncan*, 919 F.2d 981, 991 (5th Cir.1990), *cert. denied*, 500 U.S. 926, 111 S. Ct 2036, 114 L.Ed.2d 121 (1991); *United States v. Toney*, 598 F.2d 1349, 1355 (5th Cir. 1979), *cert. denied*, 444 U.S. 1033, 100 S.Ct. 706, 62 L.Ed.2d 670 (1980); *R.A.G.S. Couture, Inc. v. Hyatt*, 744 F.2d 1350, 1354 (5th Cir. 1985); *Snyder*, 505 F.2d at 601; *United States v. Shryock*, 537 F.2d 207, 209 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1977).

6. Brumley preserved error on his insufficiency of the evidence claims; he moved for a directed verdict at the close of the government's case, which was also the close of evidence. *United States v. Pierre*, 958 F.2d 1304, 1310 (5th Cir. 1992) (en banc).

a bench trial, the standard of review is a substantial evidence test. *United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir.1993), *cert. denied*, — U.S.—, 114 S.Ct. 2150, 128 L.Ed.2d 876 (1994).

> [I]n reviewing the findings of guilt by a trial court in a non-jury trial, the standard of review of the appellate court "is to determine whether such findings are supported by any substantial evidence. It is not our function to make credibility choices or to pass upon the weight of the evidence. The test is whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty."

Cardenas, 9 F.3d at 1156 (quoting *United States v. Jennings*, 726 F.2d 189, 190 (5th Cir.1984)).

[10,11] Neither Brumley nor Cely[7] actually communicated with each other via interstate wires. The only interstate wire communications in the record were those made by the Western Union agents in Lufkin, Texas and Beaumont, Texas to the Western Union computer in Missouri. In order to determine whether Brumley or Cely *caused* an interstate wire communication, the issue is whether it was foreseeable to them that their actions would cause the Western Union agents' interstate wire communications.

At trial, and on appeal, the government mistakenly believed that foreseeability and knowledge of the interstate nature of the wire communication were not elements of wire fraud.[8] Therefore, the government did not seek to put on evidence showing foreseeability. In fact, when Brumley's attorney attempted to question Western Union's

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7. The indictment charged that the conspiracy was between Brumley and Cely although Cely was an unindicted co-conspirator. If one conspirator makes a wire communication to execute a scheme, then all conspirators are liable for wire fraud. *United States v. Toney*, 598 F.2d 1349, 1355 (5th Cir.1979). Therefore, in determining knowledge and foreseeability relative to Brumley, we must also consider whether the interstate wire communication by Western Union was foreseeable to Cely.

8. We note that the government cites only Second and Eighth Circuit cases and ignores all of our foreseeability precedent.

representative about foreseeability, the government objected, arguing that the foreseeability of interstate communications was not an element of the offense and therefore not relevant.

Even though the government did not consider knowledge or foreseeability to be matters it needed to prove at trial, we have examined the record to determine whether, nevertheless, there was sufficient evidence to allow the trial judge to determine that it was foreseeable to Brumley or Cely that their actions would cause the Western Union agents' interstate wire communications. The only evidence in the record that could even inferentially show knowledge or foreseeability is: (1) Western Union is an international company with many agents throughout the United States and (2) the form Cely used in Lufkin, Texas, to initiate the sending of the money to Brumley listed, on the back, a Western Union corporate address in New Jersey.

Cely testified as a government witness. Nowhere in his testimony does Cely say, or imply, that he knew, or that it was foreseeable to him, that his actions could result in an interstate wire communication.

The only evidence that even attempted to address the foreseeability. When asked on cross-examination by Brumley's attorney whether a wire transfer customer would be aware of Western Union's interstate computer system, the Western Union representative responded, "I can't answer that."

These facts, taken together, do not constitute notice that a wire transfer of money from Lufkin, Texas, to Beaumont, Texas, will involve an interstate wire communication. There is not sufficient evidence in this record upon which a trier of fact could find *beyond a reasonable doubt* that it was foreseeable to Brumley or Cely that their actions would cause the Western Union agents to make interstate wire communications. Because use of interstate wire communications is an essential element of the offense, *Herron,* 825 F.2d at 54; *Faulkner,* 17 F.3d at 771, the evidence at trial was insufficient for the court to find Brumley guilty of wire fraud.

CONSPIRACY TO COMMIT MAIL FRAUD AND WIRE FRAUD

[12] Brumley was convicted of one count of conspiracy to commit mail fraud and wire fraud. Brumley argues on appeal that the evidence was insufficient to convict him. We agree.

[13] The essential elements of conspiracy to commit mail fraud and wire fraud, 18 U.S.C. § 371, are: (1) an agreement between two or more persons; (2) to commit interstate mail fraud or wire fraud; and (3) an overt act committed by one of the conspirators in furtherance of the conspiracy. *United States v. Hatch,* 926 F.2d 387, 393 (5th Cir.), *cert. denied,* 500 U.S. 943, 111 S.Ct. 2239, 114 L.Ed.2d 481 (1991); *United States v. Massey,* 827 F.2d 995, 1001 (5th Cir.1987); and *United States v. Gordon,* 780 F.2d 1165, 1170 (5th Cir.1986). "Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense.'" *Massey,* 827 F.2d at 1001 (quoting *Ingram v. United States,* 360 U.S. 672, 678, 79 S.Ct. 1314, 1319, 3 L.Ed2d 1503 (1959)).

[14-16] Specific intent to use interstate wires is not required for wire fraud; interstate wire communication need only be foreseeable. Likewise, for mail fraud, the use of the mails need only be foreseeable. The government's burden, therefore, is to demonstrate beyond a reasonable doubt that Brumley agreed to engage in a scheme to defraud in which the use of the mail and interstate wire communications was at least foreseeable. *Massey* 827 F.2d at 1002.

For the reasons previously stated, the evidence at trial was insufficient to prove that the use of interstate wire communications was foreseeable. Therefore, the evidence was insufficient to prove Brumley intended to commit wire fraud, an essential element of conspiracy to commit wire fraud.

[17] The evidence in the record is insufficient to show that Brumley and Cely conspired to commit mail fraud. The only testimony at trial concerning mailings was that of Alvin Little, an employee

of the TWCC. Little testified that Brumley mentioned to him that Fredregill, a client of Cely[9], was interested in bidding for the TWCC lease in Lufkin, Texas. Later, when the lease specifications came out, Little mailed Fredregill a copy. This evidence is insufficient to allow a rational finder of fact to determine *beyond a reasonable doubt* that it was foreseeable to Brumley that the mails would be used to execute a scheme. *See United States v. Walters*, 997 F.2d 1219, 1223 (7th Cir.1993).

Because the evidence was insufficient to prove that Brumley intended to commit mail fraud or wire fraud, we reverse his conviction for conspiracy to commit mail fraud and wire fraud.

MONEY LAUNDERING

[18] Brumley appeals his money laundering convictions on sufficiency of the evidence grounds, arguing that the evidence was insufficient to establish the underlying specified unlawful activity of wire fraud. We agree.

The money laundering statute, 18 U.S.C. § 1956, requires a financial transaction involving the proceeds of a specified unlawful activity. "Specified unlawful activity" is defined in 18 U.S.C. § 1956(c)(7)(A) to include any racketeering offense listed in 18 U.S.C. § 1961(1). One of the racketeering offenses identified in 18 U.S.C. § 1961(1) is wire fraud, 18 U.S.C. § 1343.

Brumley's three money laundering convictions were based on the specified unlawful activity of wire fraud. The wire frauds alleged in the money laundering counts are the same as those in the wire fraud counts. Therefore, for the reasons previously stated, the money laundering convictions are reversed because of insufficient evidence.

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9. Little did not know that Fredregill was Cely's client.

SENTENCING

Brumley raises two issues related to sentencing. However, these issues do not concern the false statements to a financial institution counts; they only concern the wire fraud, money laundering and conspiracy to commit mail fraud and wire fraud counts. As those counts have been reversed, we need not consider Brumley's sentencing issues. Therefore, Brumley's sentence of twenty-four months for two counts of making false statements to a financial institution is affirmed.

CONCLUSION

The evidence at trial was insufficient to prove that it was foreseeable to Brumley that his actions in receiving the Western Union wire transfer would cause an interstate wire communication. Because the defendant's use of interstate wire communications is an essential element of the offense of wire fraud, the evidence was insufficient to prove Brumley committed wire fraud. The evidence was likewise insufficient to prove Brumley conspired to commit wire fraud. Brumley's money laundering convictions were based on the underlying specified unlawful activity of wire fraud. Because the evidence was insufficient to convict Brumley of the underlying wire fraud, it was also insufficient to convict him of money laundering.

For the foregoing reasons, Brumley's convictions for wire fraud, money laundering and conspiracy to commit wire fraud are REVERSED. Brumley's sentence of twenty-four months for the two counts of making false statements to a financial institution is AFFIRMED.

APPENDIX B

UNITED STATES of America
Plaintiff-Appellee,

v.

Michael Bryant BRUMLEY,
Defendant-Appellant.

No. 94-40560

United States Court of Appeals,
Fifth Circuit.

March 28, 1996.

Following bench trial before the United States District Court for the Eastern District of Texas, Richard A. Schell, Chief Judge, defendant was convicted of wire fraud, money laundering and one count of conspiracy to commit mail fraud and wire fraud as well as making false financial statements to financial institution. Defendant appealed. On rehearing, superseding and withdrawing opinion at 59 F.3d 517, the Court of Appeals, DeMoss, Circuit Judge, held that: (1) statute defining term scheme or artifice to defraud as including scheme to deprive another of "intangible right to honest services" did not clearly reach conduct of state government officials in depriving citizens of right to good and faithful service, and (2) accordingly, convictions of wire fraud, conspiracy and money laundering were defective.

Affirmed in part; vacated in part and remanded.

Harlington Wood, Jr., Circuit Judge, filed dissenting opinion.

1. Statutes Key 188

In determining statute's plain meaning, Court of Appeals assumes that, absent any contrary definition, Congress intends words in

its enactments to carry their ordinary, contemporary, common meaning.

2. Statutes Key 199

Term "whoever" as used in mail and wire fraud statutes cannot be construed under rules of construction as referring to state, political subdivision of state, government, government agency, or citizens of state as body politic. 1 U.S.C.A. § 1; 18 U.S.C.A. §§ 1341, 1343.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law Key 13.1(1)

In case of criminal statute which Supreme Court has previously held does not extend to or reach conduct which Congress may want to make criminal, burden is on Congress to amend statute so that it speaks more clearly than it has, gives fair warning to world in language the common world will understand that crime will be committed if certain line is passed, and in area of sensitive relation between federal and state criminal jurisdiction, makes clear statement which assures legislature has in fact faced critical matters involved.

4. Postal Service Key 35(9)
Telecommunications Key 362

Statute defining term scheme or artifice to defraud as including scheme to deprive another of "intangible right of honest services" does not reach conduct of state government officials in depriving citizens of intangible right to good and faithful service, so as to form basis for mail or wire fraud prosecution; Congress did not clearly and expressly state in statute intent to put federal government in business of setting standards of disclosure and good government for local and state officials. 18 U.S.C.A. §§ 1341, 1343, 1346.

5. Conspiracy Key 32
Postal Service Key 35(9)
Telecommunications Key 362

State workers' compensation official's conduct in accepting

loans from attorney who practiced before compensation commission was not subject to prosecution under mail fraud, wire fraud or conspiracy statutes where statute defining requisite scheme or artifice to defraud did not contain requisite clarity in extending scope of statutes to "intangible right of honest services" to reach conduct of government officials in depriving citizens of intangible right to good and faithful service. 18 U.S.C.A. §§ 371, 1341, 1343, 1346.

6. United States Key 34

Where money laundering counts against defendant made cross reference to wire fraud counts as specified unlawful activity and identified same wire transfers named in wire fraud counts as transactions producing proceeds of specific unlawful activity, conviction under money laundering counts could not stand where wire fraud statute did not extend to conduct of state officials in depriving state citizens thereof of honest services and good government. 18 U.S.C.A. §§ 1343, 1346, 1956.

George Michael Jamail, Bernsen, Jamail, Hartley & Goodson, Beaumont, TX, for appellant.

Traci L. Kenner, Carol K. Johnson, L. Stuart Platt, Asst. U.S. Attys., Tyler, TX, Mike Bradford, U.S. Atty., Beaumont, TX, for appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before WOOD[1], JOLLY and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge,

Michael Brumley appeals his conviction at a bench trial on three counts of wire fraud, three counts of money laundering and one

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1. Circuit Judge of the Seventh Circuit, sitting by designation.

count of conspiracy to commit mail fraud and wire fraud. Brumley does not appeal his conviction on two counts of making false statements to a financial institution, but he appeals his sentence. The opinion in this case issued under date of July 18, 1995, is withdrawn. We pretermit resolution of the claim of evidentiary insufficiency by Brumley since we have concluded on rehearing that a more fundamental defect exists as to counts 1-7 of the conviction, i.e. the statutes in question (18 U.S.C. §§ 1343 and 1346)[2] do not proscribe the conduct described in these counts of the indictment. We affirm as to the two counts of making false statements to a financial institution[3] and vacate the judgment of conviction on the wire fraud, mail fraud, money laundering and conspiracy counts and remand for dismissal of the indictments as to these counts.

BACKGROUND

Brumley began working for the Texas Industrial Accident Board (IAB) in July, 1976, as a pre-hearing examiner. In July 1988 he was promoted to the position of regional director for the Houston area. As part of the state's new workers' compensation law, the IAB was reorganized in 1990 as the Texas Workers' Compensation Commission (TWCC) and Brumley was appointed the TWCC's regional associate

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2. 18 U.S.C. § 1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both 18 U.S.C. § 1346 provides:

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

3. Brumley was sentenced to 24 months in prison for each of the two counts of making false statements to a financial institution, to be served concurrently.

director (essentially the same position he had held with the IAB). Beginning in 1982, Brumley solicited and accepted approximately $40,000 in loans from local attorneys, which he admitted was a violation of IAB ethical guidelines.

Between 1987 and 1992, Brumley also accepted over $86,000 in "loans" via wire transfers from another local attorney, John Cely. Although Cely understood that the money would never be repaid, he continued to make loans to Brumley. Cely wired the money from the Western Union office in Lufkin, Texas, to Brumley in Beaumont, Texas.

The procedure for making the Western Union wire transfers involved Cely, or one of his employees, filling out a form listing the recipient and the amount of the transfer. Cely paid for the wire transfer with checks payable to H.C. Walker, the Lufkin Western Union franchisee. The Western Union agent then, through a personal computer, dialled into Western Union's main computer in Bridgeton, Missouri. The Western Union agent would write a unique ten-digit number, which he obtained through the computer in Missouri, on the back of the form he gave to Cely. This would serve as the receipt. Brumley was then immediately able to pick up the money.

After being notified that a money transfer was waiting for him, Brumley would go to a Western Union office in Beaumont to pick up the transfer. He would fill out a form identifying himself as the recipient and the Beaumont Western Union agent would call the Western Union computer in Bridgeton, Missouri, to verify the information. Brumley was then given a check for the amount of the transfer, which he would cash at either a bank or a grocery store.

In 1988, pursuant to a complaint from one of Cely's clients, the IAB began an investigation into Cely's law practice. Brumley on several occasions urged the IAB to reconsider its decision to formally investigate Cely, and Brumley assisted Cely in altering subpoenaed documents. Finally, Brumley aided Cely's efforts to lease TWCC property in Lufkin. The lease, if it had been consummated, would have violated ethical guidelines, as Cely practiced before the TWCC. Never-

theless, Brumley directed that the building specifications be faxed to Cely's office in the name of one of Cely's clients, James Fredregill. A TWCC employee later mailed the lease specifications to Fredregill. The property was ultimately leased to a disinterested party.

Michael Brumley was indicted in November 1993 for conspiracy to defraud the citizens of the state of Texas of the honest use of his services via mail and wire communications (18 U.S.C. § 371), wire fraud (18 U.S.C. §§ 1343, 1346), Money laundering (18 U.S.C. § 1956) and making false statements to a financial institution (18 U.S.C. § 1014). Both before and during his bench trial Brumley moved to dismiss counts 1-7 of the indictment on grounds that (1) such counts "constitute an unwarranted and impermissible federal intrusion into affairs of the Texas industrial Accident Board;" (2) the Tenth Amendment to the United States Constitution "reserves all rights to the State no specifically entrusted to the Federal Government;" and (3) that prosecution of Brumley under these counts "would violate his right of equal protection of law under the 14th Amendment" and would violate "the 7th Amendment prohibiting the infliction of cruel and unusual punishment" in that any culpable conduct under state law would only be a misdemeanor while such conduct would be punishable as a felony under the United States statutes. The trial judge overruled such motions and convicted Brumley on all nine counts in the indictment and he was sentenced to 48 months in prison. Brumley now appeals.

McNALLY AND CARPENTER

We must start with a thorough understanding of the Supreme Court's landmark decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L..Ed.2d 292 (1987). This case involved the prosecution of a former public official of Kentucky and a private individual for alleged violation of the federal mail fraud statute, 18 U.S.C. § 1341. The principal theory of the prosecution in *McNally*, which was accepted by the courts below, was that the defendants' participation in a self-dealing patronage scheme defrauded the citizens and government of Kentucky of certain "intangible rights," such as the right to have the commonwealth affairs conducted honestly. The jury convicted

defendants and the Court of Appeals affirmed the convictions, relying upon a line of decision from the Courts of Appeals holding that the mail fraud statute proscribe schemes to defraud citizens of their intangible rights to honest and impartial government. The Supreme Court granted certiorari and reversed. The most illuminating language of the majority opinion is that found at page 360 of 483 U.S., and the top of page 2882 of 107 S.Ct. which reads:

> Rather than construe the statute [mail fraud, § 1341] in a manner that leaves its outer boundaries ambiguous and *involves the Federal Government in setting standards of disclosure and good government for local and state officials,* we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, *it must speak more clearly than it has.* (emphasis added)

This seven to two majority opinion overturned the theories upon which a large number of prior circuit court decisions had been based. Justice Stevens' dissent identifies in detail the prior circuit court cases and categorizes them in separate footnotes as follows:

> Footnote 1, page 362-63, 107 S.Ct. page 2883
> State and federal officials convicted of defrauding citizens of their right to the honest services of their governmental officials;
>
> Footnote 2, page 363, 107 S.Ct. page 2883
> Elected officials and campaign workers convicted of mail fraud for using the mail to falsify votes, thus defrauding the citizenry of its right to an honest election;
>
> Footnote 3, page 363-64, 107 S.Ct. page 2883-84
> In the private sector, agents with clear fiduciary duty to their employers or unions, found guilty of defrauding by accepting kick backs or selling confidential information; and
>
> Footnote 4, page 364, 107 S.Ct. page 2884
> In the private sector, defendants convicted for defrauding individuals of their rights to privacy and other non-monetary rights.

The key language from *McNally* quoted above clearly states that the majority overruled the body of case law referred to in Justice Stevens' footnotes for two reasons:

> 1. The majority did not want to construe the statute as involving the federal government in setting standards of disclosure and good government for local and state officials. This is a healthy recognition of the realities of our federal system and pulls the rug out from under the conceptual analysis used by the circuit courts in deciding the cases in footnotes 1 and 2 of the dissent; and
>
> 2. The majority did not want to construe the mail fraud statute in a manner that would create ambiguity in its outer limits, so it said the statute would apply only to the "protection of property rights," thereby pulling the rug out from under the category of cases described in footnotes 3 and 4.

Both the majority opinion and the dissent in *McNally* indicate that Congress might change the Court's construction; but the majority made it absolutely clear that Congress "must speak more clearly than it has" if it desired to make such changes.

Shortly after its decision in *McNally,* the Supreme Court decided *Carpenter v. United States,* 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). In *Carpenter,* a unanimous Supreme Court described their holding in *McNally* as follows:

> We held in McNally that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government" and that the statute is "limited in scope to the protection of property rights."

Id. at 25, 108 S.Ct. at 320 (internal citations omitted).

In *Carpenter* the Supreme Court found that the property rights, though intangible (i.e. right of an employer to make exclusive use of confidential information generated by its employees), were none the

less property rights and that "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." Furthermore, in *Carpenter,* the Court characterized an employer's contractual right to an employee's honest and faithful service as "an interest too ethereal in itself to fall within the protection of the mail fraud statute." *Id.* Therefore, *Carpenter* clearly reaffirms the majority opinion in *McNally* and simply recognizes that both tangible and intangible property rights are protected by the mail fraud and wire fraud statutes.

PASSAGE OF § 1346

On the last day of the 100th Congress in October 1988, the Congress passed a highly publicized and much debated omnibus drug bill and attached to that bill, as one of some 30 unrelated provisions, was a provision containing the test of what has now been codified at 18 U.S.C. § 1346. *(See* Pub.L. 100-690, Title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.) The text of this provision was placed in the Omnibus Drug Bill on the same day as the ultimate passage of that bill and the legislative history of this provision is minimal. Therefore, our first task is to decide whether the language used by the Congress in § 1346 satisfies the admonition of the Supreme Court in *McNally* that Congress "speak for clearly than it has."

[1] As with any statutory question we begin with the language of the statute. Kellogg *v. United States, (In re West Texas Marketing Corp.),* 54 F.3d 1194, 1200 (5th Cir.), *cert denied,* —U.S.—, 116 S.Ct. 523, 133 L.Ed.2d 430 (1995). In determining a statute's plain meaning, we assume that, absent any contrary definition, "Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning." *Pioneer Investment Services v. Brunswick Associates,* 507 U.S. 380, 388, 113 S.Ct. 1489, 1495, 123 L.Ed.2d 74 (1993) (internal quotation marks omitted). As the Supreme Court has states: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic Contractors, Inc.* 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982) (internal quotation marks omitted). If the language is clear, then "the in-

quiry should end." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989).

[2] The statute in question is one sentence in length:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346. The chapter referred to is Chapter 63 of Title 18 entitled "Mail Fraud" and the term "scheme or artifice to defraud" appears in four sections: *Section 1341*, Mail Fraud; *Section 1342*, Fictitious Names or Addresses; *Section 1343*, Fraud by Wire, Radio or Television; and *Section 1344*, Bank Fraud.. It should be noted that the pronoun "whoever" is the operative word used at the beginning of each of these sections. Section 1 of Title I of the United States Code relating to rules of construction, contains the following definition:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
> "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals; . . .

We note that among the meanings of the word "whoever" in Section 1 Title I, there is nothing that could even remotely be interpreted or construed to mean "a state," "a political subdivision of a state," " a government," "a governmental agency," or "the citizens of a state as a body politic."

So if we substitute for the pronoun "whoever" its statutory definition and if we insert the definitional language of § 1346 in § 1343 (Wire Fraud), which is the relevant section involved here in *Brumley*, the statute would read as follows:

> WHO [any person, individual, corporation, company, association, firm, partnership, society or joint stock company who], having devised or intending to devise any scheme or

artifice [to deprive *another* of the intangible right of honest services (emphasis added)]

CONDUCT transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce

WHAT any writings, signs, signals, pictures or sounds

MOTIVE for the purpose of executing such scheme or artifice; etc.

The critical question we have to answer is: To whom or what does the pronoun "another" refer? The word "another" is not defined anywhere in the United States Code. *Webster's* says that the first and most frequent use of "another" as a pronoun is "one more; an additional one."[4] But grammarians tell us that the word "another" when used as a pronoun is an indefinite pronoun which has no specific meaning but draws its meaning from the context in which it is used. A logical argument could be made, therefore, that the pronoun "another" as incorporated by § 1346 into § 1343 would have the same meaning as the pronoun "whoever." We are reluctant, however, to decide this issue on the basis of stacking one pronoun on another (no pun intended) and conclude that the language of § 1346 is not sufficiently clear on it face so as to eliminate the need for a look at the legislative history of the passage of § 1346.

LEGISLATIVE HISTORY

Recognizing that the word "another" may be sufficiently ambiguous to justify a review of the legislative history of the passage of § 1346, we turn to that task to see what light that history might shed on the issue of "to whom or what does the pronoun 'another' refer?" In undertaking this task, we have kept square in our minds (1) the admo-

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4. *Webster's Collegiate Dictionary*, Random House, 1992.

nition of the Supreme Court in *McNally* that "if Congress desires to go further, it must speak more clearly than it has" and (2) the fact that *Brumley* involves the very case of the federal government "setting standards of disclosure and good government for local and state officials" which the Supreme Court in *McNally* recognized as requiring "clear and definite language." In *McNally,* the Supreme Court cited *United States v Bass,* 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), which states the two policies underlying the task of construing criminal statutes passed by Congress, as follows:

> A fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair so far as possible the line should be clear . . .
>
> There is a second principle supporting today's result: Unless Congress conveys it purpose clearly, it will not be deemed to have significantly changed the federal-state balance . . .
>
> As this court emphasized only last term in *Rewis v. United States* [401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971)], we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. at 348-49, 92 S.Ct. at 522-23 (footnotes and cited cases omitted).

The specific text of what has become 18 U.S.C. § 1346 was inserted in the Omnibus Drug Bill on the very day that the Omnibus Drug Bill was finally passed by both the House and the Senate. The text of what is now § 1346 was never included in any bill filed in either the House of Representatives or the Senate and as a result the text of § 1346 was never referred to any committee or either the House or the Senate, was never the subject of any committee report from either the House or the Senate and was never the subject of any floor debate

reported in the Congressional Record. There are *only* two items of legislative history pertinent to the text of § 1346 as actually passed. First, there are remarks on the floor of the House entered by Representative Conyers regarding various items in the Omnibus Drug Bill including the section of that bill which would add a new § 1346 to Title 18. After describing the Supreme Court decision in *McNally* and its effect on various prior federal circuit court opinions, Representative Conyers stated:

> This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. The amendment also applies to the wire fraud provision and precludes the *McNally* result with regard to that provision.
>
> The amendment adds a new section to 18 U.S.C. 63 that defines the term "scheme or artifice to defraud to include a scheme or artifice to defraud another of the intangible right of honest services." Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property. This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended.

134 Cong.Rec. H11, 108-01 (daily ed. Oct. 21, 1988).

Second, after the passage of the Omnibus Drug Bill, the Senate Judiciary Committee prepared and entered into the Congressional Record a report regarding all of the provisions in the Anti-Drug Abuse Act of 1988 which were within the jurisdiction of the Senate Judiciary Committee for the purpose of detailing "Congress' intent in enacting these provisions." Regarding the text of what is now 18 U.S.C. § 1346, this report states as follows:

Section 7603. Intangible Rights for Mail and Wire Fraud.

> This section overturns the decision of *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all

> of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change.

134 Cong.Rec. S17,360-02 (daily ed. Nov. 10, 1988).[5]

[3,4] We find these items of legislative history unpersuasive for two reasons. First, and foremost, the Supreme Court has never attributed a great deal of significance to contemporaneous remarks of a sponsor of legislation. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, 100 S. Ct 2051, 2061, 64 L.Ed. 2d 766 (1980); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S.Ct. 1705, 1722, 60 L.Ed.2d 208 (1979).[6] Similarly, post-enactment statements of a congressional committee are not entitled much weight. *GTE Sylvania, Inc. supra*, at 118, 100 S.Ct. at 2061; *Weinberger v. Rossi*, 456 U.S. 25, 33-36, 102 S.Ct. 1510, 1517-18, 71 L.Ed.2d 715 (1982). Second, we know of no principle of constitutional law which contemplates that the Congress can by simple legislative fiat overrule, overturn, nullify or render ineffective a decision of the Supreme Court. Any such process would be a serious breach of the separation of powers doctrine inherent in our Constitution. Consequently, we do not give any persuasive effect to the portions of both Representative Conyers' statement and the Senate Judiciary Committee report that this new section "restores the mail fraud provision to where that provision was before the *McNally* decision" or is intended "to reinstate all of the pre-*McNally* case law pertaining to mail and wire fraud statutes without change." Particularly in the case of a criminal statute which the Supreme Court has previously

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5. We read the phrase "including the right of the public to the honest services of public officials" in this report as pure wishful thinking. Surely the staff of the Senate Judiciary Committee knew that Section 2 of S. 2973 was rejected by the House of Representatives; see our discussion of S. 2973 hereinafter.

6. In the case of Representative Conyer's remarks, affording them any weight is dubious, as he voted *against* the final omnibus drug bill. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 Harv.J.Leg. 153, 169 n. 69 (1994). Furthermore, we note that Representative Conyer's remarks say nothing to explain the substitution of "another" for "organization;" and say nothing about a "state" or "subdivision of a state" being deprived of "an intangible right to good, faithful and honest service;" see our discussion of S. 2973 hereinafter.

held does not extend to or reach conduct which Congress may want to make criminal, the burden is on the Congress to amend that statute so that (i) "it speaks more clearly than it has" *(McNally);* (ii) "gives fair warning to the world in language that the common world will understand" that a crime will be committed if a certain line is passed, *(Bass)*; and (iii) in the area of "the sensitive relation between federal and state criminal jurisdiction," the language makes a "clear statement" which "assures that the legislature has in fact faced . . . the critical matters involved" *(Bass).* We conclude that the one sentence addition accomplished by the passage of 18 U.S.C. § 1346 does not meet the test required by the Supreme Court insofar as the conduct charged to be criminal by the government in this case, i.e. the conduct of a state official alleged to constitute deprivation of the public's right to honest services or good government.

Our conclusion in this regard is bolstered by the legislative history which does show that the same Congress which passed the new 28 U.S.C. § 1346 had before it at least two other bills which expressly spoke to the subject of conduct of public officials which defraud the public of the right to good government. The first of these was H.R. 3050, 100th Cong., 1st Sess., filed July 29, 1987, which provided for the addition of a new section in Chapter 63 of Title 18 of the United States Code which would read as follows:

Section 1346. Definition of Defraud for Certain Sections.

As used in Sections 1341 and 1343, the term "defraud" includes the defrauding of the citizens of a body politic—

1. of their right to the conscientious, loyal, faithful, disinterested and unbiased performance of official duties by a public official thereof; or

2. of their right to have the public business conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct and fraud.

This bill was referred to the House Committee on the Judiciary but was never further acted upon.

Second, the most comprehensive vehicle by which Congress sought to change the *McNally* decision in a manner sufficient to satisfy the tests of *McNally* was Senate Bill 2793 (S. 2793), titled the "Anti-Corruption Act of 1988," which was introduced in the Senate on September 7, 1988, referred to the Judiciary Committee, reported favorably by that committee without a report, and passed later by the Senate on October 14, 1988. This bill was then sent to the House of Representatives where it was referred to the House Judiciary Committee on October 19, 1988. Concurrently with its passage by the Senate, S. 2793 was designated by a unanimous consent agreement of the Senate as one of a large number of amendments to "comprise the joint leadership package" which would be attached as amendments to H.R. 5210, the Drug Initiative Act of 1988, Omnibus, which was then before the Senate having earlier been passed by the House. H.R. 5210 (with S. 2793 included) was then passed by the Senate and sent back to the House. On October 22, 1988, the House of Representatives reconsidered H.R. 5210 with the leadership package of amendments attached in the Senate and made various amendments thereto, and then passed the revised bill. One of the amendments made by the House of Representatives was to delete the text of S. 2973 and substitute therefor the language which now appears codified as 18 U.S.C. § 1346. H.R. 5210 as then amended was sent back to the Senate who concurred in those amendments later on October 22, 1988.

Because of the direct relevance of S. 2973 to the text of what was ultimately passed as 18 U.S.C. § 1346, we append a copy of that bill as an addendum to this opinion and point out that Section 2 of this bill (pages 1-6 of addendum) would have created a new Section 225 entitled "Public Corruption" to be inserted in Chapter 11 of Title 18 of the United States Code which makes criminal: (a) depriving or defrauding the inhabitants of a state or a political subdivision of a state of the honest services of an official or employee of such state or subdi-

vision; and (b) depriving or defrauding the inhabitants of a state or political subdivision of a state of a fair and impartially conducted election process in any primary, runoffs, special or general election. On its face Section 2 of S. 2793 is a fairly comprehensive, articulate and clear attempt to define criminal conduct which would satisfy the requirements of *McNally* that the Congress speak "more clearly than it has" and, in the area of federal/state relations, that Congress clearly express its intention to affect such relations. If Section 2 of S. 2793 had been adopted by the House of Representatives, we would not now be charged with determining the meaning of the statute.

Section 3 of S. 2793,, entitled "White Collar Crime," contemplates the addition of a new § 1346 entitled "Scheme or Artifice to Defraud" which would be added to Chapter 63 of Title 18 of the United States Code. It is apparent that Section 3 of S. 2793 is a progenitor in some respects of the text of 18 U.S.C. § 1346 which was ultimately adopted by both Houses. Change the word "organization" to "another" and put a period after the words "honest services" and you would have the text of what was ultimately passed.

There is no report in the legislative history explaining why the House of Representatives declined to accept the full text of S. 2793 as part of the omnibus Anti-Drug Act of 1988 (H.R. 5210). However, the legislative history does indicate the following facts:

A. No companion bill to S. 2793 was introduced in the House of Representatives either before or after the time when S. 2793 was introduced in the Senate. Accordingly, the earliest the House Judiciary Committee could have possibly given formal consideration to the content of S. 2793 would have been in the four day window following passage of S. 2793 by the Senate and referral to the House Judiciary Committee on October 19 and final consideration of the Omnibus Drug Bill in the House on October 22, 1988.

B. The only bill previously pending in the House of Representatives during the 100th Congress which dealt with creating a new § 1346 to define the term "defrauding" as used in the mail fraud (1341) and wire fraud (1343) statutes was H.R. 3050 referred to earlier in this opinion. The legislative record does not indicate any hearings held by the House Committee on the Judiciary on H.R. 3050 and likewise there is no indication in the legislative record that the House Judiciary Committee issued any report on this bill.

From these facts we conclude that the House of Representatives clearly refused to join the Senate in the comprehensive definition of crime involving "public corruption" as set forth in Section 2 of S. 2793.

The legislative history likewise does not reveal any express report or statement as to why the House of Representatives opted to change the word "organization" to the word "another" and put a period after the words "honest services" in the portion of Section 3 of S. 2793 which the House of Representatives retained as Section 7603 of the Omnibus Crime Bill. The word "organization" is defined in Section 18 of Title 18 as meaning "a person other than an individual." The substitution of the pronoun "another" for the noun "organization" would work some enlargement of the class of potential victims, since the word "organization" by definition does not mean individual persons. But the critical question to our inquiry here is whether simply by making this one word change the House intended to accomplish the same results that would have been accomplished if Section 2 of S. 2793 had also been adopted. We think not. Simply to pose the question is to answer it. If the House of Representatives truly agreed with the Senate that "depriving the inhabitants of a state or political subdivision of a state of the honest services of an official or employee of such state or subdivision" should become a federal crime when use was made of the mails or interstate wire, radio or television communications, then the clearest and most comprehensive way to do that (and satisfy the Supreme Court's tests in *McNally*) would be to adopt the entirety of Section 2 of S. 2793. The House of Representatives clearly refused to do that. We are not prepared, therefore, to say that the House intended

that the changes made to Section 3 of S. 2793 and the adoption of that changed section would accomplish through the back door what they had decided not to do through the front door.[7]

> Given this legislative history, we draw these conclusions:
>
> 1. Both the House and the Senate certainly knew how to "speak clearly and definitively" on the subject of fraud depriving the citizens of a state or political subdivision of the intangible right of good and honest government, but the House refused to do so: and
>
> 2. None of the bills containing any such express provisions received a majority vote of both houses of Congress. Instead, what was passed by both houses of Congress was a last minute, "bobtailed" compromise which had never been the subject of hearings in either house.

Therefore, we conclude that the wording of § 1346, (perhaps on its face but for sure when interpreted in light of the legislative history), simply does not effect a change in the portion of the *McNally* opinion which held that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government."

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7. Our conclusion that the House of Representatives during the 100th Congress in 1988 consciously refused to pass Section 2 of S. 2793 is corroborated by the fact that in subsequent Congresses the Senate passed and included in its version of various crime bills provisions almost verbatim the same as the provisions of Section 2 of S. 2793. *See* 135 Cong. Rec. S12,430-32 (daily ed. Oct. 3, 1989) (statement of Sen. Biden); 136 Cong.Rec. S6638-39 (daily ed. May 21, 1990) (statement of Sen. Biden); 137 Cong.Rec. S9382-83 (daily ed. July 9, 1991); 138 Cong.Rec. S.6911-12 (daily ed. May___. 1992). None of these Senate proposals were adopted by the House of Representatives. In our view, there is clear evidence over a number of Congresses that the House of Representatives does not agree with the Senate as to the need for "public corruption" legislation. Likewise, we read the continued efforts by the Senate to introduce and pass provisions expressly dealing with "public corruption" as an indication that the Senate has at least some doubts as to the efficacy of 28 U.S.C. § 1346 as passed in 1988 to accomplish the criminalization of "conduct of public officials depriving the public of honest service or good government."

Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL BRYANT BRUMLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
to the
United States Court Of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
VOLUME II

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SUBSEQUENT CASE LAW

In the hopes of finding some prior review of this legislative history by other courts, we have diligently searched all Supreme Court and Circuit Court cases in which § 1346 is mentioned. We find:

A. There is only one Supreme Court case which contains a mention of § 1346 and that is *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). That mention occurs at page 1155 in the dissent of Justice Stevens where he cites the *McNally* decision and points out that it was "quickly corrected by the 100th Congress." Justice Stevens, in his dissent, accuses the majority of excessive literalism and cites *McNally* and § 1346 as an example thereof.

B. There are many circuit court cases which hold that § 1346 cannot be given any retroactive effect, including a case from the Fifth Circuit. *See United States v. Loney*, 959 F.2d 1332 (5th Cir.1992). We mention this "no retroactive effect" because the counts of the indictment in *Brumley* contain numerous allegations of "misconduct" which go back in time some six or seven years before the effective date of § 1346 which is November 18, 1988. Specifically, count 1, the conspiracy count, states that the conspiracy started "from on or about a date in 1987" and counts 2-4, the wire fraud counts, allege that the wire fraud began "on or about a date in 1982."

C. There are quite a few circuit court cases which have commented on the effect of the passage of § 1346, but these comments have occurred in cases where the alleged criminal conduct occurred before the passage of § 1346 and these comments are, therefore, dicta. Two Fifth Circuit cases that are examples of this commentary are: *United States v. Little*, 889 F.2d 1367, 1369 (5th Cir.1989); and *United States v. Holley*, 23 F.3d 902, 910 (5th Cir.1994).

D. There are two circuit court cases dealing with conduct occurring after the passage of § 1346 and involving conduct of a pub-

lic official. The first is *United States v. Bryan,* 58 F.3d 933 (4th Cir.1995). The principal issue in *Bryan* was whether an indictment under § 1341 as amended by § 1346 (to deprive another of the intangible right of honest services) required proof of violation of some underlying predicate law, statute or regulation. In holding that the mail fraud statute contains no predicate violation requirement, the Fourth Circuit relied on its pre-*McNally* case law to that effect, and in footnote 1 at page 940, concluded that:

> [I]t appears that *McNally* has since been nullified by statute through Congress' enactment of 18 U.S.C. § 1346. *United States v. Dischner,* 974 F.2d 1502 (9th Cir.1992); *see also United States v. DeFries,* 43 F.3d 707 (D.C.Cir.1995); *United States v. Thomas,* 32 F.3d 418 (9th Cir.1994); *United States v. Holley,* 23 F.3d 902 (5th Cir. 1994); *see also West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 114, 111 S.Ct. 1138, 1155, 113 L.Ed.2d 68 (1991) (Stevens, J., dissenting).

As pointed out earlier, the comment about the passage of § 1346 in the Fifth Circuit case of *Holley* is pure dicta. The same is true for the other circuit court cases cited by the Fourth Circuit in *Bryan,* i.e. *Dischner,* 974 F.2d at 1518 n. 16; *DeFries,* 43 F.3d at 709 n. 1; and *Thomas,* 32 F.3d at 419. We think it unusual that the Fourth Circuit would rely, as authority, on the comment by Justice Stevens in his dissent in *Casey.* Also, we note the use of the term "nullified by statute" which the Fourth Circuit in *Bryan* quotes favorably from the Ninth Circuit decision in *Dischner* and which for reasons discussed earlier we decline to recognize as a viable theory. For these reasons, we do not view the Fourth Circuit opinion in *Bryan* as persuasive authority.

The second case dealing with conduct of a public official after passage of § 1346 is *United States v. Waymer,* 55 F.3d 564 (11th Cir.1995). In this case, Waymer, who was an elected member of the Atlanta Board of Education, entered into an agreement with Allen, who provided sanitation and pest control services to all of the Atlanta public schools, under which Waymer would receive a 15% commission on all contracts with the school system. In April 1993, a superseding indictment charged Waymer with 24 counts of mail fraud in

violation of 18 U.S.C. §§ 1341 and 1346 and 11 counts of money laundering. The mail fraud counts alleged (1) a scheme to defraud the citizens of Atlanta of Waymer's honest services and (2) a scheme to defraud Allen of money and property. Waymer pleaded not guilty but the jury returned guilty verdicts on most of the mail fraud counts based on the scheme to defraud the citizens of Atlanta of Waymer's honest services. One of the issues raised by Waymer on appeal was "whether § 1346 is unconstitutionally vague or over broad." In responding to this contention, the Circuit Court stated:

The "honest services amendment" to the mail fraud statute, 18 U.S.C.A. § 1346, allows the United States to predicate a mail fraud prosecution on a "scheme or artifice to deprive another of the intangible right of honest services."[FN3]

[FN3] In 1988, Congress enacted section 1346, overriding the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). *McNally* had held that the mail fraud statute did not criminalize schemes to defraud citizens of their rights to honest government. *Id.* at 359, 107 S.Ct. at 2881. Congress' purpose in enacting section 1346 was to restore the mail fraud statute to its pre-*McNally* position by allowing mail fraud convictions to be predicated on deprivations of honest services. *United States v. Martinez*, 905 F.2d 709, 715 (3rd Cir. 1990).

United States v. Waymer, 55 F.3d at 568. With respect for the views of our colleagues on the Eleventh Circuit, we do not find their analysis of the effect of passage of § 1346 persuasive. The case of *United States v. Martinez*, 905 F.2d 709, which the court in *Waymer* cited at the end of footnote 3 for the proposition that § 1346 was intended to restore the mail fraud statute to its pre-*McNally* position, is a terribly weak precedent for that proposition for these reasons: (i) neither of the defendants in *Martinez* were state officials or state employees; (ii) the criminal conduct in *Martinez* occurred *before* the Suprene Court decision in *McNally* and, therefore, *before* the passage of § 1346; (iii) the court in *Martinez* expressly recognized that its commentary about the passage of § 1346 was "not determinative of the issue before us" and, therefore, dicta; and (iv) the only evidence of legislative history relied upon by the court in *Martinez* was the statement of Representative Conyers referred to earlier in this opinion. Just like the Fourth Circuit in *Bryan*,

the Eleventh Circuit in *Waymer* has simply relied on conclusionary dicta from other Circuit Court opinions, none of which made any effort whatsoever to evaluate the language of § 1346 itself nor the peculiar process by which § 1346 was adopted. We stand, comfortably and with some confidence as to its correctness, on the analysis of the statutory language and legislative history which we have set forth earlier.

[5] In conclusion, we note again the language of the indictment in this case which alleges:

> (a) *As to Count 1 (conspiracy)*
> [T]o defraud by scheme and artifice the citizens of the State of Texas, including members of the Texas Industrial accident Board (and it successor, the T.W.C.C.), an agency of the State of Texas, from receiving the intangible right to honest services;
>
> (b) *In Counts 2-4 (wire fraud)*
> [H]aving intentionally and willfully devised the scheme and artifice described in paragraphs A-1 through 23 and B-1 through 30 [which cover time periods prior to the passage of § 1346] to defraud and deprive the citizens of the State of Texas, including the Industrial Accident Board and its successor (the Texas Workers Compensation Commission), a state agency, of the intangible right to good, faithful, and honest service.

There is no allegation of any kind as to any property interest, other than the concept of "the intangible right to good, faithful, and honest service," and there is no allegation except "the citizens of the State of Texas" and "a state agency" as the entities from whom the honest services were deprived.

We do not reach the question of whether § 1346 is constitutional. If and when Congress clearly and expressly says they want to put the federal government in the business of "setting standards of disclosure and good government for local and state officials," the question of whether Congress has the power to do that would have to be faced. As we read *McNally*, the Supreme Court has left that question

unanswered. Since we read § 1346 as it now exists as not reaching such conduct of state government officials, we need not address the constitutionality issue which would be posed when and if Congress speaks to expressly proscribe such conduct.

CONSPIRACY COUNT

Brumley was convicted of one count of conspiracy to commit mail fraud and wire fraud. The essential elements of conspiracy to commit mail fraud and wire fraud, 18 U.S.C. § 371, are: (1) an agreement between two or more persons; (2) to commit interstate mail fraud or wire fraud; and (3) an overt act committed by one of the conspirators in furtherance of the conspiracy. *United States v. Hatch,* 926 F.2d 387, 393 (5th Cir.), *cert. denied,* 500 U.S. 943, 111 S.Ct. 2239, 114 L.Ed.2d 481 (1991); *United States v. Massey,* 827 F.2d 995, 1001 (5th Cir. 1987); and *United States v. Gordon,* 780 F.2d 1165, 1170 (5th Cir. 1986). "Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense." *Massey,* 827 F.2d at 1001 (quoting *Ingram v. United States,* 360 U.S. 672, 678, 79 S.Ct. 1314, 1319, 3 L.Ed.2d 1503 (1959)). The conspiracy count in this case uses identically the same language as used in the substantive wire fraud counts, i.e. "to defraud by scheme and artifice the citizens of the State of Texas, including members of the Texas Industrial Accident Board (and its successor, the TWCC), an agency of the State of Texas, from receiving the intangible right to honest services" and cites §§ 1341, 1343 and 1346. Since we have concluded earlier in this opinion that the amendatory language of § 1346 does not reach conduct of public officials in depriving a state or the citizens thereof of honest services, we hold that the conspiracy count is defective for the same reasons.

MONEY LAUNDERING COUNTS

[6] Brumley was convicted of three counts of money laundering. The money laundering statute, 18 U.S.C.. § 1956, requires a financial transaction involving the proceeds of a specified unlawful activity. The term "specified unlawful activity" is defined in 18 U.S.C.

§ 1956(c)(7)(A) to include any racketeering offense listed in 18 U.S.C. § 1961(1). One of the racketeering offenses identified in 18 U.S.C. § 1961(1) is wire fraud under 18 U.S.C. § 1343. Each of the money laundering counts against Brumley makes a cross-reference to the wire fraud counts as the "specified unlawful activity" and identifies identically the same wire transfers named in the wire fraud counts as the transactions producing the "proceeds of a specified unlawful activity". Since we have earlier concluded in this opinion that the language of § 1346 does not extend the wire fraud statute to conduct of state officials in depriving the state or the citizens thereof honest services and good government, we hold for the same reasons that the money laundering counts are defective.

SENTENCING

Brumley raises two issues related to sentencing which only concern the wire fraud, money laundering and conspiracy to commit mail fraud and wire fraud counts. Since we have reversed Brumley's conviction as to those counts, we need not consider Brumley's sentencing issues. Brumley did not appeal his conviction on the false statements to a financial institution counts nor his sentencing under those counts.

CONCLUSION

For the reasons stated herein, Brumley's convictions on counts 1-7 for conspiracy, wire fraud and money laundering are VACATED and the case is REMANDED to the district court for entry of an order of dismissal as to those counts. Brumley's conviction and sentence of 24 months for the two counts of making false statements to a financial institution is AFFIRMED.

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellee,

v.

Michael Bryant BRUMLEY,
Defendant-Appellant.

No. 94-40560.

United States Court of Appeals,
Fifth Circuit.

July 17, 1996.

Mervyn J. Hamburg, United States Department of Justice, Criminal Division, Washington, DC, Traci Lynne Kenner, Assistant U.S. Attorney, Lon Stuart Platt, Office of the United States Attorney, Tyler, TX; Carol Kay Johnson, Assistant U.S. Attorney, United States Attorneys Office, Sherman, TX, for U.S.

George Michael Jamail, Bernsen, Jamail & Goodson, Beaumont, TX, for defendant-appellant.

Appeal from the United States District Court for the Eastern District of Texas, Richard A. Schell, Chief Judge.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion March 28, 1996, 5 Cir.,
1996, 79 F.3d 1430)

Before POLITZ, Chief Judge, and KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.

BY THE COURT:

A member of the court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX D

UNITED STATES of America,
Plaintiff-Appellee,

v.

Michael Bryant BRUMLEY,
Defendant-Appellant.

No. 94-40560.

United States Court of Appeals,
Fifth Circuit.

June 18, 1997.

Following bench trial before the United States District Court for the Eastern District of Texas, Richard A. Schell, Chief Judge, defendant was convicted of wire fraud, money laundering, and one count of conspiracy to commit mail fraud and wire fraud, as well as making false financial statements to financial institution. On rehearing, superseding and withdrawing opinion at 59 F.3d 517, the Court of Appeals, 79 F.3d 1430, vacated wire fraud, conspiracy, and money laundering convictions. On grant of government's petition for rehearing en banc, the Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) government entity could be victim of scheme to deprive another of intangible right of honest services; (2) citizens as body politic could be victim of scheme to deprive another of intangible right of honest services; (3) "honest services" referred to services which defendant state official owed to state employer under state law; and (4) defendant, who was employed by state workers' compensation board and received payments from attorneys representing claimants who appeared before him, engaged in scheme to deprive another of intangible right of honest services, for purpose of wire fraud statute.

Affirmed.

E. Grady Jolly and DeMoss, Circuit Judges, filed dissenting opinion in which Jerry E. Smith, Circuit Judge, joined.

1. Telecommunications Key 362

Under statute defining scheme or artifice to defraud as including scheme to deprive another of intangible right of honest services, for purpose of wire fraud statute, governmental entity qualified as "another" and could be victim of such fraud, regardless of what types of persons or entities could commit such offense. 18 U.S.C.A. §§ 1343, 1346.

See publication Words and Phrases for other judicial constructions and definitions.

2. Telecommunications Key 362

Under statute defining scheme or artifice to defraud as including scheme to deprive another of intangible right of honest services, for purpose of wire fraud statute, "honest services" can include honest and impartial government. 18 U.S.C.A. §§ 1343, 1346.

See publication Words and Phrases for other judicial constructions and definitions.

3. Telecommunications Key 362

Under statute defining scheme or artifice to defraud as including scheme to deprive another of intangible right of honest services, for purpose of wire fraud statute, term "another" included citizens as body politic, and statute thus encompassed state official's abuse of state office through deprivation of intangible rights. 18 U.S.C.A. §§ 1343, 1346.

4. Criminal Law Key 13.1(1)

Constructions of criminal statute announced by Supreme Court or lower courts can give citizens fair warning of statute's scope, even if cases are not fundamentally similar.

5. Telecommunications Key 362

Under statute defining scheme or artifice to defraud as including scheme to deprive another of intangible right of honest services, for purpose of wire fraud statute, "honest services" refers to services which defendant state official must provide to official's employer under state law and government must prove, in federal prosecution, that such services were in fact not delivered. 18 U.S.C.A. §§ 1343, 1346.

6. Telecommunications Key 362

To show scheme to deprive another of intangible right of honest services, for purpose of wire fraud statute, federal prosecutor must prove that conduct of defendant state official breached duty respecting provision of services owed to official's employer under state law, such that official either acted or failed to act contrary to requirements of official's job under state law. 18 U.S.C.A. §§ 1343, 1346.

7. Telecommunications Key 362

State official's violation of state law that prohibits only appearances of corruption will not alone support violation of statutes proscribing wire fraud consisting of scheme to deprive another of intangible right of honest services. 18 U.S.C.A. §§ 1343, 1346.

8. Telecommunications Key 362

"Honest services," within meaning of statutes proscribing wire

fraud consisting of scheme to deprive another of intangible right of honest services, contemplates that in rendering some particular service or services, defendant state official was conscious of fact that official's actions were something less than in best interests of employer or that official consciously contemplated or intended such actions. 18 U.S.C.A. §§ 1343, 1346.

9. Federal Courts Key 404

Under statutes proscribing wire fraud consisting of scheme or artifice to deprive another of intangible right of honest services, interpretation of "scheme or artifice to defraud" is determined by federal common law, not state law. 18 U.S.C.A. §§ 1343, 1346.

10. Telecommunications Key 362

Conduct of state official employed by state workers' compensation board, in receiving payments from attorney representing claimants who appeared before official, constituted scheme to deprive another of intangible right of honest services, for purpose of wire fraud statute. 18 U.S.C.A. §§ 1343, 1346.

Traci Lynne Kenner, Assistant U.S. Attorney, Lon Stuart Platt, Tyler, TX, Mervyn J. Hamburg, U.S. Department of Justice, Criminal Division, Washington, DC, Carol Kay Johnson, Assistant U.S. Attorney, Sherman, TX, for Plaintiff-Appellee.

George Michael Jamail, Bernsen, Jamail & Goodson, Beaumont, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas.

Before POLITZ, Chief Judge, and KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Michael Bryant Brumley was convicted in a bench trial of conspiring to defraud the citizens of the State of Texas of honest services by use of interstate wire communications and the United States mail in violation of 18 U.S.C. § 371, three counts of wire fraud in violation of 18 U.S.C. § 1343, three counts of money laundering in violation of 18 U.S.C. § 1956, and two counts of making a false statement to a financial institution in violation of 18 U.S.C. § 1014. Brumley does not appeal his conviction on the last two counts of defrauding a financial institution and they are not before us.

As we will explain, Brumley's primary contention is that the government has misused federal criminal statutes to prosecute a state employee for ethical lapses. Along the way to review by the *en banc* court the issues on appeal have narrowed to four. First, Brumley urges that neither the plain language of § 1346 nor its legislative history expands the types of victims protected by the statute to include a state employer. Second, he insists that an ethical lapse, or at worst a state misdemeanor, is not a deprivation of honest services. Third, he argues that the Commerce Clause does not support § 1346. Finally, he contends that the money laundering statute does not reach his conduct. Brumley also challenged the statute and the indictment on vagueness grounds in the district court, but did not pursue these contentions on appeal.

We reject each of these contentions and affirm the convictions. In doing so we reject the argument that Congress failed in its 1988 effort to expand the statute to cover the deprivation of honest services which the *McNally* and *Carpenter* decisions found were outside the statute's reach. See *Carpenter v. United States*, 484 U.S. 19, 25, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987); *McNally v. United States*, 483 U.S. 350, 359-60, 107 S.Ct. 2875, 2881-82, 97 L.Ed.2d 292 (1987). This argument has gathered strength from the Supreme Court's recent Commerce Clause decisions, but we ultimately conclude that it cannot escape the plain language of § 1346.

I

A panel of this court first reversed the convictions for wire and mail fraud, as well as money laundering and conspiracy. *United States v. Brumley*, 59 F.3d 517 (5th Cir.1995), *withdrawn*, 79 F.3d 1430 (5th Cir.1996). The panel reversed for lack of evidence that Brumley could foresee the interstate character of the wire transmission relied upon by the government. After withdrawing this opinion, the panel, with one judge dissenting, held that the term "another" as used in 18 U.S.C. § 1346 does not reach citizens of a state or political subdivision who have been deprived of the honest services of their public officials. *United States v. Brumley*, 79 F.3d 1430, 1441-42 (5th Cir. 1996). We granted the government's petition for rehearing *en banc* on July 17, 1996. *United States v. Brumley*, 91 F.3d 676 (5th Cir. 1996).

II

Texas' workers' compensation law was long administered by the Texas Industrial Accident Board. Under this regime the Board dealt with three groups: claimants, their lawyers, and insurance carriers insuring the employers. Brumley worked for the Board and resided in Beaumont, Texas. In 1990 the Texas legislature changed the process for resolving workers' compensation claims. The Board became the Texas Workers' Compensation Commission, and Brumley was promoted to Regional Associate Director of the new commission, and moved to the new commission's Houston office. Brumley's duties included the handling of claims arising under the old law and, according to the indictment, responsibility for "identifying attorneys and insurance carriers who failed to follow TWCC or IAB rules and regulations." Brumley's work gave him knowledge of the conduct of lawyers, the identity of unrepresented claimants, and the details of the process itself.

Brumley never seemed to be able to live within his income. As early as 1982, he began to solicit loans from lawyers representing claimants and their assistance in obtaining loans from lending institutions. In 1985 and 1986, while he was conducting prehearing conferences in

cases in Lufkin, Texas, he charged and never repaid several hundred dollars to the account of a claimant's counsel at the local country club. By 1988 Brumley had borrowed money from at least eight lawyers and struck up a relationship with John M. Cely, a Lufkin attorney with a substantial workers' compensation practice. Cely and persons employed by his law firm made frequent appearances before Brumley in prehearing conferences. They began a process whereby Cely would cause wire transfers to be made from the Western Union office in Lufkin to Brumley at various locations in Texas. These wire transfers were accomplished electronically through a Western Union facility located outside of Texas. From 1987 to May of 1992, Cely made some seventy wire transfers to Brumley totaling approximately $86,730. In all, Brumley "borrowed" some $112,156 from eleven lawyers, including Cely. None of this sum was ever repaid.

The indictment charged a scheme to defraud "the citizens of the State of Texas, including the members of the Texas Industrial Accident Board . . ., and agency of the State of Texas, from receiving the intangible right to honest services."

III

Brumley contends that Congress did not intend to reach schemes to deprive an entity of state government of the intangible right of honest services in its 1988 enactment of § 1346. That statute provides:

> For the purpose of this Chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Reading § 1346 with § 1343 we have the following prohibition:

> Whoever, having devised or intending to devise any [scheme or artifice to deprive another of the intangible right of honest services], . . . transmits or causes to be transmitted by means of [interstate wires] for the purpose of executing such scheme or artifice,

shall be fined under this title or imprisoned not more than five years, or both.

Brumley's present argument, taking a cue from the second panel opinion, takes two related cuts at the application of the statute to his conduct. First, he contends that "another" has the same meaning as the term "whoever" for purposes of the fraud chapter of the criminal code, specifically Chapter 63 of Title 18. And "another" cannot include his state employer or the citizens of the State of Texas. Second, invoking federalism, Brumley contends that Congress failed to state its purpose with the clarity demanded for federal incursions into state matters, at least those traveling on the commerce power.

[1,2] We are persuaded that a governmental entity qualifies as "another' within the meaning of § 1346, and that "honest services" can include "honest and impartial government." The panel opinion notes that Section 1 of Title I of the U.S.Code provides that "'person' and 'whoever' include corporations, companies, associations, firms, partnerships, and societies, and joint stock companies, as well as individuals." 79 F.3d at 1435. It "note[s] that among the meanings of the word 'whoever' in Section 1, Title I, there is nothing that could even remotely be interpreted or construed to mean 'a state,' 'a political subdivision of a state,' 'a government,' 'a governmental agency,' or 'the citizens of a state as a body politic.'" *Id.*

Brumley is himself an "individual," and we think he must qualify as a "whoever" within the meaning of the statute, in which case he can be prosecuted for depriving "another" of his intangible right of honest services. This case does not involve a prosecution of a state, state subdivision, government, or agency. Rather, it is a prosecution of an individual who abused his position as an employee of a state commission. That the mail fraud statute reaches Brumley's conduct is consistent with the proposition that the statute does not allow prosecution of a state or state agency.

Moreover, Section 1 of Title I provides that "person" and "whoever" *include* the listed terms. We read this to mean that "person" and

"whoever" include the listed terms without deciding whether other non-mentioned entities may qualify as a "person" or a "whoever." Otherwise, Congress would have said something other than "include," such as "person" and "whoever" *mean* the listed terms (or *consist of,* or perhaps *include only).* In this criminal statute, "another" defines the range of victims while "whoever" defines the perpetrator; we do not think it makes sense to define the victims by reference to the definition of the perpetrator. *See United States v. Castro,* 89 F.3d 1443, 1456 (11th Cir.1996) (concluding that the plain language and legislative history of § 1346 do not limit its application to governmental victims of fraud), *cert. denied.* ——U.S.——, 117 S.Ct. 965, 136 L.Ed.2d 850 (1997).

IV

[3] Brumley argues that even if "another" does not modify "whoever," it does not include "citizens as the body politic." The exact thrust of this contention is uncertain, given the fact that the *defendant* is not a political entity but a person charged with fraudulent activity while employed by a state entity. We understand the argument to be that "another" should not be read to reach such abuses of state office. The contention is that § 1343 is at least sufficiently uncertain that it need not be so read, and traditional principles of lenity and the doctrine of clear statement counsel that it should not be. The argument points to *McNally* itself, specifically the Court's observation that:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [the statute] as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

483 U.S. at 360, 107 S.Ct. at 2881-82.

The argument fails because Congress accepted the Court's invitation and was clear in its purpose. First, we think the statutory lan-

guage plainly reaches state officials such as Brumley, and thus it is unnecessary to repair to legislative history. That history is recounted by the dissent and by the panel majority, *see* 79 F.3d at 1435-40, and we will not rehearse it again. There is nothing to suggest that Congress did not intend by § 1346 to overturn the Supreme Court's *McNally* decision and to insist that the fraud statutes cover deprivations of intangible rights such as those charged in the counts for which Brumley was convicted. We join the First, Fourth, and Eleventh Circuits in rejecting similar attacks on § 1343 convictions. *United States v. Sawyer,* 85 F.3d 713, 723-24 (1st Cir.1996); *United States v. Bryan,* 58 F.3d 933, 939-43 (4th Cir. 1995); *United States v. Waymer,* 55 F.3d 564, 568 n. 3 (11th Cir.1995), *cert. denied,* ——U.S.——, 116 S.Ct. 1350, 134 L.Ed.2d 519 (1996).

[4] The dissent, worried that the text of § 1346 fails to give citizens adequate notice, accuses the majority of illicitly re-drafting a criminal statute. But we are hardly announcing a common-law crime. As the Supreme Court has recently explained, "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier,* ——U.S.——, ——, 117 S.Ct. 1219, 1225, 137 L.Ed. 2d 432 (1997). Gauging fair notice requires an inquiry into the state of the law as a whole, not merely into the words printed on a single page of the United States Code. Constructions of a statute announced by the Supreme Court or lower courts can give citizens fair warning, even if the cases are not "fundamentally similar." *Id.* at ——-——, 117 S.Ct. at 1226-28.

Here Brumley had notice that Congress had repudiated the Supreme Court's interpretation in *McNally.* Congress, in other words, announced that it wanted the courts to enforce the honest-services doctrine developed in the years leading up to *McNally.* Because Congress was not faced with a uniform formulation of the precise contours of the doctrine, some defendants on the outer reaches of the statute might be able to complain that they were not on notice that Congress criminalized their conduct when it revived the honest-services doctrine. But even if there are such defendants, Brumley is not among them. As we will

explain, his conduct was inconsistent with his duties under Texas law. The boundaries of "intangible rights" may be difficult to discern, but that does not mean that it is difficult to determine whether Brumley in particular violated them. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 505, 102 S.Ct. 1186, 1196, 71 L.Ed.2d 362 (1982) (rejecting a vagueness challenge to a quasi-criminal ordinance regulating the sale of drug paraphernalia because the ordinance was "reasonably clear in its application to the complainant").

V

[5] We must next find the meaning of honest services as used in this federal statute.[1] As we have explained, Congress has insisted that the fraud statutes cover the deprivation of intangible rights. In doing so, it reestablished the honest services doctrine. It bears emphasis that before *McNally* the doctrine of honest services was not a unified set of rules. And Congress could not have intended to bless each and every pre-*McNally* lower court "honest services" opinion. Many of these opinions have expressions far broader than their holdings. *See United States v. Curry*, 681 F.2d 406, 419 n. 1 (5th Cir. 1982) (Garwood, J., concurring). Congress, then, has set us back on a course of defining "honest service," and we turn to that task.

Before *McNally*, the meaning of "honest services" was uneven. *See, e.g., United States v. Holzer*, 816 F.2d 304, 307-10 (7th Cir.) (affirming the conviction of a county judge who accepted "loans" from attorneys who practiced before him, even though the government never showed that the judge ruled differently in a case because of any lawyer's willingness to make a "loan"), *vacated*, 484 U.S. 807, 108 S.Ct. 53, 98 L.Ed.2d 18 (1987) (remanded for reconsideration in light of *McNally*); *United States v. Silvano*, 812 F.2d 754 (1st Cir. 1987) (affirming the conviction of a city budget director who did not disclose

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1. The statute continues to draw much cogent and scholarly commentary. *See, e.g.*, George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis*, 82 Cornell L.Rev. 225 (1997).

his secret plan to enrich a friend with an expensive and unnecessary project bid); *United States v. Lovett,* 811 F.2d 979 (7th Cir. 1987) (affirming the conviction of a mayor who accepted an undisclosed 5% interest in a local cable company attempting to bid on a city franchise); *United States v. Bruno,* 809 F.2d 1097, 1104-06 & n. 1 (5th Cir.) (affirming convictions under § 1343 based on a scheme to bribe), *cert. denied,* 481 U.S. 1057, 107 S.Ct. 2198, 95 L.Ed.2d 853 (1987); *United States v. Barber,* 668 F.2d 778 (4th Cir.) (affirming the conviction of an Alcoholic Beverage Control Commission official who "withdrew" liquor from a state warehouse with subsequent "authorization " from liquor companies so that the companies would be billed), *cert. denied,* 459 U.S. 829, 103 S.Ct. 66, 74 L.Ed.2d 67 (1982); *Bradford v. United States,* 129 F.2d 274, 276 (5th Cir.) (grounding a § 1343 conviction on a scheme to use city officials' positions to sell buses to the city at exorbitant prices for unearned profits), *cert. denied,* 317 U.S. 683, 63 S.Ct. 205, 87 L.Ed. 547 (1942); *Shushan v. United States,* 117 F.2d 110, 115 (5th Cir.) ("No trustee has more sacred duties than a public official and any scheme to obtain an unfair advantage by corrupting such a one must in the federal law be considered a scheme to defraud."), *cert. denied,* 313 U.S. 574, 61 S.Ct. 1085, 85 L.Ed. 1531 (1941).

A close look at these cases uncovers two uncertainties regarding the draw by this federal statute upon state law, specifically in defining the statutory element of honest services. First, must the services be owed under state law? Second, must the breach of a duty to provide services rooted in state law violate the criminal law of the state? We decide today that services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered. We do not reach the question of whether a breach of a duty to perform must violate the criminal law of the state.

[6,7] We begin with the plain language of the statute. There are two words—"honest" and "services." We will not lightly infer that Congress interded to leave to courts and prosecutors, in the first instance, the power to define the range and quality of services a state employer may choose to demand of its employees. We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal

government the right to impose upon states a federal vision of appropriate services—to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure. Under the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law. Stated directly, the official must act or fail to act contrary to the requirements of his job under state law. This means that if the official does all that is required under state law, alleging that the services were not otherwise done "honestly" does not charge a violation of the mail fraud statute. The statute contemplates that there must first be a breach of a state-owed duty. It follows that a violation of state law that prohibits only appearances of corruption will not alone support a violation of §§ 1343 and 1346. *See united States v. Sawyer,* 85 F.3d 713, 728-29 (1st Cir. 1996). As the Ninth Circuit put it, "[t]o hold otherwise that illegal conduct alone [would suffice] would have the potential of bringing almost any illegal act within the province of the mail fraud statute." *United States v. Dowling,* 739 F.2d 1445, 1450 (9th Cir. 1984), *rev'd on other grounds,* 473 U.S. 207, 105 S.Ct. 3127, 87 L.Ed.2d 152 (1985).

[8] Stated another way, "honest services" contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer—or that he consciously contemplated or intended such actions. For example, something close to bribery. If the employee renders all the services his position calls for, and if these and all other services rendered by him are just the services which would be rendered by a totally faithful employee, and if the scheme does not contemplate otherwise, there has been no deprivation of honest services. *See, e.g., United States v. Czubinski,* 106 F.3d 1069, 1977 (1st Cir. 1997) (reversing convictions under §§ 1343 and 1346 because although unauthorized browsing of taxpayer files by an IRS employee constitutes a breach of personnel policies, "there [was] no suggestion that he failed to carry out his official tasks adequately, or intended to do so"); *United States v. Rabbitt,* 583 F.2d 1014, 1026 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979); *United*

States v. McNeive, 536 F.2d 1245, 1246 (8th Cir. 1976). Thus, the mere violation of a gratuity statute, even one closer to bribery than the Texas statute, will not suffice. *Sawyer,* 85 F.3d at 729-30.

[9] Finally, the statute proscribes an actual scheme or artifice to defraud. There is nothing in the informing principles of federalism or legislative history to suggest that the scheme or artifice to defraud elements are drawn from state law. Rather, they are familiar terms of federal criminal law generating and drawing their sustenance from federal common law. These wholly federal elements, read with the jurisdictional elements of mail usage and coupled with the draw upon state law for the definition of service, allow the statute to serve federal interests without supplanting rights of core state governance. The indictment charged that Brumley used his position to assist Cely in exchange for money. Thus, the federal component of the crime was properly charged, and, as we will explain, was proved.

We pause to put aside the frequent invocations of a deprivation of *citizens'* rights to honest services. *See Bruno,* 809 F.2d at 1105-06; *Shushan,* 117 F.2d at 115. The reference to such "rights" of citizens has little relevant meaning beyond a shorthand statement of a duty rooted in state law and owed to the state employer. Despite its rhetorical ring, the rights of citizens to honest government have no purchase independent of rights and duties locatable in state law. To hold otherwise would offer § 1346 as an enforcer of federal preferences of "good government" with attendant potential for large federal inroads into state matters and genuine difficulties of vagueness. Congress did not use those words, and we will not supply them.

The federalism arguments that inform the definition of "honest services" under federal criminal law are powerful, and we acknowledge them in our holdings today. A sitting state official with adjudicatory authority who accepts payments from lawyers practicing in front of him and simultaneously acts for those lawyers in his official capacity contrary to his state-law duty has provided dishonest services to his employer, here the Texas Industrial Accident Board and its successor, the TWCC. As it turns out, Texas condemns such conduct by making it a criminal offense punishable by imprisonment for up to one year and

a fine as large as $4,000, and this violation was part of a fraudulent scheme and conspiracy under § 1346, as found by the district court. The tension inherent in federal criminalization of conduct by state officials innocent under state law is absent here.

We have held that services under § 1346 are those an employee must provide the employer under state law. Using his office to pursue his own account and not that of his employer, Brumley violated a Texas criminal statute. This case does not then require us to decide whether the amended federal statute criminalizes conduct no part of which is criminal under state law. *Cf. United States v. Cochran*, 109 F.3d 660, 667 (10th Cir.1997) ("[I] would give us great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing.").

Our previous cases have not made clear the use of state law we emphasize today. To the extent our prior cases are contrary, they are overruled.

VI

[10] Having concluded that § 1343 applies to deprivations of honest services by state employees and that such services must be owed under state law, we now address Brumley's contention that his own actions did not do so. At trial, the government stipulated that it would not try to prove that any IAB award was enhanced by Brumley or that any claimant was awarded more money by Brumley or that Brumley referred any unrepresented claimant to an attorney in return for cash. Rather, the government's "position [was] that the quid pro quo [was] intangible, such as favoritism or other types of intangible matters." The government points out that Cely admitted to the trial court that the $86,780 in payments to Brumley were not "loans." And during the time period that Brumley was receiving these payments from Cely, Brumley vouched for Cely's good character when Cely was investigated by IAB and interceded to try to stop the investigation altogether. Brumley also advised Cely on the alteration of documents subpoenaed by the IAB, so as to make easy detection of wrongdoing difficult. The relationship between Cely and Brumley was so tight that

when one of Cely's employees inquired into Cely's unconcerned confidence about an impending TWCC/IAB investigation of Cely, he replied "We have Brumley." Brumley also helped Cely's attempt to lease property in Lufkin to the TWCC by advising Cely how to conceal his efforts and by aggressively discouraging the TWCC from leasing from another bidder.

The district court found "ample and convincing" evidence to support each of the counts of the indictment. According to the district court, Brumley and Cely engaged in a conspiracy in which Cely would give Brumley money and Brumley would use his position with the IAB and TWCC to assist Cely's dealings with the agency. Although the district court found clear evidence of ethical violations, it did not rely on them to make its decision. Instead, the district court found a scheme to defraud that included conduct that violated Texas penal law. *See* Tex. Penal Code Ann. § 36.08(e) (making it a Class A misdemeanor for a public servant with judicial authority to "solicit[ ], accept[ ], or agree[ ] to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant of [his] tribunal").

Brumley's other contentions are without merit, and we affirm the judgment of convictions.

AFFIRMED.

E. GRADY JOLLY and DeMOSS, Circuit Judges, with whom JERRY E. SMITH, Circuit Judge, joins, dissenting:

We respectfully dissent from what we consider to be an issue-evasive and jurisprudentially flawed majority opinion. With little analysis, and much judicially engrafted legislation, it holds that general, undefined, vague, and ambiguous words constitute a clear statement that Congress intended for federal prosecutors and grand juries to police the conduct of state officers acting in their official state capacities. We should make clear that we do not at all suggest that the criminal statute at issue is unconstitutional or must otherwise be stricken—only

that as the statute is applied in this case, the indictment and proof fails to state and prove a crime.

INTRODUCTION

First, the majority needs to be reminded that when interpreting a criminal statute, courts must apply the rule of lenity; that is, when choosing between two readings of a criminal statute, the courts *must* favor the narrower interpretation unless Congress has spoken to the contrary in language that is clear and definite. This is an indisputable rule of statutory construction ignored by the majority. Second, the Supreme Court has emphasized that when a statute is applied, as here, to alter the balance of federalism, congressional intent must be plain on the face of the statute—an intent that even infrared eyes cannot detect from this statute.

The words we interpret today are these few: "For the purpose of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." For the majority to prevail, these words must clearly demonstrate that Congress intended to apply the wire fraud statute to police the integrity of state officials acting in the capacities of their offices. Moreover, these words must satisfy constitutional due process, which requires that citizens be given fair notice that specific conduct constitutes a crime.

The majority utterly fails to address these principles of statutory construction. The reason the majority opinion avoids raising these crucial matters is simple: it cannot possibly conform its conclusions with principles of statutory construction.

Principles of statutory construction are not the only obstacles to the majority's reading of the statute. The legislative history is also devastating to the majority's position that Congress has spoken clearly in § 1346 to reach the conduct of state officers acting in their official capacity. Because the statute fails on its face to make a crime of the charged conduct, this dissent need not address the matter of legislative

history. The legislative history does, however, make plain beyond any doubt that § 1346 cannot be fairly construed to reflect a clear congressional intent to police the integrity of state officers. Thus, rather than deal with the legislative history, the majority pursues the only course available to it: silence.

Indeed, the only significant issue in this case that the majority squarely faces is the meaning of "honest services," a term that the majority acknowledges is ambiguous and undefined by Congress. One would think that the majority would directly acknowledge that this patent and indisputable ambiguity cripples this prosecution. But no. Instead, the majority assumes a role somewhere between a philosopher king and a legislator to create its own definitions of the terms of a criminal statute. Sure, the majority should recognize the laudatory principle to which we as a Court try scrupulously to adhere: The courts may not assume the place of Congress by writing or rewriting criminal laws pursuant to which citizens will be prosecuted. This is solely the prerogative of Congress. With great respect for the usual judgment of our colleagues, we must say that the majority opinion in this respect is hardly a *judicial* opinion.[1]

The majority opinion is flawed in other respects as we shall develop more fully in this dissent. Its argument that it makes no sense to "define victims by reference to the definition of the perpetrator" is sophistry, a glib phrase giving the appearance of a truism, resorted to by the majority because it can provide *no* answer to otherwise define

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1. That it is necessary for the majority to write more in the nature of legislative drafting than judicial reasoning underscores that the majority implicitly acknowledges that the statute does not reflect a clear statement of Congressional intent. For example, the majority says at page 733, *"We decide today"* that "honest servcies" must be owed under state law in order to establish a crime under § 1343 as amended by § 1346. Furthermore, at page 734, the majority overrules all previous cases that criminalize conduct under § 1343, *if* these cases involve less, or more, than the majority's determination of the appropriate state law component. In short, the majority's legislative engraftment onto § 1343 gives the appearance that Brumley is being convicted of a crime that is now in the process of being devised by the Court.

the meaning of "another" as it appears in the statute. Although it may be less than a perfect method of divining the hidden intent of Congress, we suggest that defining "another," which is otherwise completely undefined by Congress, by referring to "whoever," is an absolutely correct grammatical construction of the one-sentence statute; at least it provides *some* definitional meaning or limits to the term "another." The majority opinion provides *no* definitional limits for a key term in a criminal statute. The majority also says nothing about the due process problems of sufficient notice of what behavior has been prohibited when such key terms have no definitional limits.

In this dissent, we shall further show that the majority, without any analysis, badly states that "another" means the citizens as the body politic. It is beyond our capacity to accept the conclusion that by using the term "another" in § 1346, Congress clearly has referred to the entire "body politic" of the State of Texas. In so concluding without analysis, the majority gives the phrase judicial *chutzpa* new meaning.

After the majority completes its assumed legislative task of defining honest services, it appears to have some second thoughts about the application of "another" to the body politic, and "pauses" to

> put aside the frequent invocations of a deprivation of citizens' rights to honest services. The reference to such "rights" of citizens has little relevant meaning beyond a shorthand statement of a duty rooted in state law and owed to the state employer. Despite its rhetorical ring, the rights of citizens to honest government have no purchase independent of rights and duties locatable in state law. To hold otherwise would offer § 1346 as an enforcer of federal preferences of "good government" with attendant potential for large federal in-roads into state matters and genuine difficulties of vagueness. Congress did not use those words, and we will not supply them.

Maj. Op. at 734-35 (internal citation omitted). It is certainly true that Congress did not use those words. *Indeed, that is a major point of this dissent.* The *indictment,* however, used those words. Does the majority

conclude that the indictment charges the specifics of a crime unauthorized by Congress? If for no other purpose than to remind the majority, we point out that the indictment charged Burmley with depriving "the Citizens of the State of Texas . . . from receiving . . . honest servcies." Yet the majority says the term has no "purchase." No purchase? The deprivation of the "citizens of Texas rights to honest services" in this case has "purchased" a federal prison sentence for Mr. Brumley.

We turn now to more fully address the substantive issues raised by this appeal. We first address the Supreme Court opinions in *McNally* and *Carpenter,* the cases that prompted the passage of § 1346. We will then show how the Supreme Court has made it unmistakably plain that Congress must make a clear statement when it intends to extend a criminal statute into policing the behavior of state officials. Next we will show that the statutory language cannot possibly be interpreted as such a clear statement, and that the legislative history debunks the majority's position that § 1346 is a clear statement that Congress intended to police the honesty of state government officials in their official capacities. Finally, we demonstrate that the phrase "honest services" is entirely ambiguous.

McNALLY AND CARPENTER

A thorough understanding of the Supreme Court's landmark decision in *McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), is the first order of business. This case involved the prosecution of a former public official of Kentucky and a private individual for alleged violation of the federal mail fraud statute, 18 U.S.C. § 1341. The principal theory of the prosecution in *McNally,* which was accepted by the courts below, was that the defendants' participation in a self-dealing patronage scheme defrauded the citizens and government of Kentucky of certain "intangible rights," such as the right to have the commonwealth affairs conducted honestly. The jury convicted the defendants and the Court of Appeals affirmed the convictions, relying upon a line of decision from the Courts of Appeals holding that the mail fraud statute proscribed schemes to defraud citizens of their intangible rights to honest and impartial government.

The Supreme Court granted certiorari and reversed. The most illuminating language of the majority opinion in *McNally* provides that:

> Rather than construe the statue [mail fraud, § 1341] in a manner that leaves its outer boundaries ambiguous and *involves the Federal Government in setting standards of disclosure and good government for local and state officials,* we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, *it must speak more clearly than it has.*

Id. at 360, 107 S.Ct. at 2881-82 (emphasis added).

This seven to two majority opinion overturned the theories upon which a large number of prior Circuit Court decisions had been based. Justice Stevens' dissent identifies in detail the prior Circuit Court cases and categorizes them in separate footnotes:

> *Footnote 1*
> State and federal officials convicted of defrauding citizens of their right to the honest services of their governmental officials, *id.* at 362, 107 S.Ct. at 2883;
>
> *Footnote 2*
> Elected officials and campaign workers convicted of mail fraud for using the mail to falsify votes, thus defrauding the citizenry of its right to an honest election *id.* at 363, 107 S.Ct. at 2883;
>
> *Footnote 3*
> In the private sector, agents with clear fiduciary duty to their employers or unions, found guilty of defrauding by accepting kick backs or selling confidential information, *id.* at 363, 107 S.Ct. at 2883; and
>
> *Footnote 4*
> In the private sector, defendants convicted for defrauding individuals of their rights to privacy and other non-monetary rights. *Id.* at 364, 107 S.Ct. at 2884.

The key language from *McNally* quoted above clearly states that the majority overruled the body of case law referred to in Justice Stevens' footnotes for two reasons:

> 1. The majority did not want to construe the statute as involving the federal government in setting standards of disclosure and good government for local and state officials. This is a healthy recognition of the realities of our federal system and pulls the rug out from under the conceptual analysis used by the Circuit Courts in deciding the cases in footnotes 1 and 2 of the dissent; and
>
> 2. The majority did not want to construe the mail fraud statute in a manner that would create ambiguity in its outer limits, so it said the statute would apply only to the "protection of property rights," thereby pulling the rug out from under the category of cases described in footnotes 3 and 4.

Both the majority opinion and the dissent in *McNally* indicate that Congress might change the Court's construction; but the majority made it absolutely clear that Congress "must speak more clearly than it has" if it desired to make such changes.

Shortly after its decision in *McNally,* the Supreme Court decided *Carpenter v. United States,* 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). In *Carpenter,* a unanimous Supreme Court described its holding in *McNally* as follows:

> We held in *McNally* that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government" and that the statute is "limited in scope to the protection of property rights."

Id. at 25, 108 S.Ct. at 320 (internal citations omitted).

In *Carpenter,* the Supreme Court found that the property rights, though intangible, were none the less property rights and that "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Id.* Therefore, *Carpenter* clearly reaffirms

the majority opinion in *McNally*, but recognizes that both tangible and intangible *property* rights are protected by the mail fraud and wire fraud statutes as they then stood.

Because of the emphasis that the majority opinion places on the circumstance of the employment relationship between Brumley and the TWCC, it should be noted that in *Carpenter* the Court characterized an employer's contractual right to an employee's honest and faithful services as "an interest too ethereal in itself to fall within the protection of the mail fraud statute." *Id.* Consequently, *Carpenter* foreclosed the use of the "intangible right of honest servcies" doctrine in private employment relationships, just as *McNally* had foreclosed the use of that doctrine as to the defrauding of "citizens of their intangible rights to honest and impartial government."

PRINCIPLES OF STATUTORY CONSTRUCTION

On the last day of the 100th Congress in October 1988, Congress passed a highly publicized and much debated omnibus drug bill. Attached to that omnibus bill, as one of some 30 other unrelated provisions, was a provision containing the text of what has now been codified as 18 U.S.C. § 1346. *See* Pub.L.100-690, Title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508. Our first task is to decide whether the language used by the Congress in § 1346 satisfies the admonition of the Supreme Court in *McNally* that Congress "speak more clearly than it has."

As with any statutory question, analysis begins with the language of the statute. *Kellogg v. United States, (In re West Texas Marketing Corp.)*, 54 F.3d 1194, 1200 (5th Cir.), *cert. denied*, —U.S.—, 116 S.Ct. 523, 133 L.Ed.2d 430 (1995). In determining a statute's plain meaning, the courts assume that, absent any contrary definition, "Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning." *Pioneer Investment Services v. Brunswick Associates*, 507 U.S. 380, 388, 113 S.Ct. 1489, 1495, 123 L.Ed.2d 74 (1993) (internal quotation marks omitted). As the Supreme

Court has stated: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin V. Oceanic Contractors, Inc.*, 458 U.S. 564,571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982) (internal quotation marks omitted). If the language is clear, then "the inquiry should end." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989).

In *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), the Supreme Court stated the principles which the Court has long followed in construing criminal statutes passed by Congress:

> First, as we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 [91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971)] . . . In various ways over the years we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal CIT Credit Corp.*, 344 U.S. 218, 221 [73 S.Ct. 227, 229, 97 L.Ed. 260 (1952)] . . . This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 [51 S.Ct. 340, 341, 75 L.Ed. 816 (1931)] . . . Second, because of the seriousness of criminal penalties and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes* in BENCHMARKS, 196, 209 (1967).

Id. at 347-48, 92 S.Ct. at 522-23 (other internal citations omitted).

Therefore, the Supreme Court has recognized that criminal statutes must be construed narrowly. Moreover, the Court has emphasized a second critical principle:

> Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance . . . As this Court emphasized only last term in *Rewis v. United States*, [401 U.S. at 812, 91 S.Ct. at 1059,] we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. In *Rewis*, we declined to accept an expansive interpretation of the travel act. To do so, we said then, "would alter sensitive federal state relationships [and] could overextend limited federal police resources." While we noted there that "[i]t is not for us to weigh the merits of these factors," we went on to conclude that the "fact that they are not even discussed in the legislative history . . . strongly suggests that Congress did not intend that [the statute have the broad reach]." 401 U.S. at 812 [91 S.Ct. at 1059] . . . As in *Rewis*, the legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal state balance in the way now claimed by the government.

Id. at 349-50, 92 S.Ct. at 523-24 (internal footnotes and citations omitted) (alterations in original). When legislation has the potential of altering the relationship between state and federal police powers, this Court must adopt a narrow interpretation of the statute.

It is clear, of course, that, under the Supremacy Clause, the Congress *may* legislate in areas traditionally regulated by the States. Nevertheless, the Court has emphasized that "[t]his is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991). "If Congress

intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear in the language* of the statute." *Id.* at 460 111.S.Ct. at 2401 (internal citations omitted) (emphasis added).

INTERPRETING THE TEXT OF SECTION 1346

The text of § 1346 is only one sentence in length and reads as follows:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346. A plain reading of the statutory text produces numerous ambiguities and questions:

a. Who is the "deprivor" and who is the "deprivee?"
b. What is an "intangible right?"
c. What are "honest services?"
d. What is "the intangible right of honest services?"

If a criminal statute is to satisfy the "fair warning" test of *Bass*, answers to these questions must be available to the "common world" in a fashion which is clear and readily understandable so that the line where permitted conduct ends and prohibited conduct begins is certain.

The answer to the first question, "Who is the deprivor?," should be clear to the common man. The chapter referred to is Chapter 63 of Title 18 entitled "Mail Fraud," and the term "scheme or artifice to defraud" appears in four sections: *Section 1341*, Mail Fraud; *Section 1342*, Fictitious Names or Addresses; *Section 1343*, Fraud by Wire, Radio or Television; and *Section 1344*, Bank Fraud. The pronoun "whoever" is the pronoun used at the beginning of each of these sections. Section 1 of Title I of the United States Code, relating to rules of construction, contains the following definition:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
> "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals; . . .

If one substitutes for the pronoun "whoever" its statutory definition, and if one also inserts the definition of § 1346 in § 1343 (Wire Fraud), which is the relevant section involved in this case, the statute reads as follows:

> WHO [any person, individual, corporation, company, association, firm, partnership, society or joint stock company who],
> PROHIBITED CONDUCT having devised or intending to devise scheme or artifice [to deprive another of the intangible right of honest services]
> transmits or causes to be transmitted by means or wire, radio or television communication in interstate or foreign commerce any writings, signs, signals, pictures or sounds
> MOTIVE for the purpose of executing such scheme or artifice; etc.

The answer to the first question, therefore, is that the deprivor is "any person, individual, corporation, company, association, firm, partnership, society or joint stock company."

The answer to the second question, "Who is the deprivee?," is not clear. *The word "another" is not defined anywhere in the United States Code.* The dictionary says that the first and most frequent use of "another" as a pronoun is "one more; an additional one."[2] Grammarians teach that the word "another," when used as a pronoun, is an indefinite pronoun which has no specific meaning in and of itself but draws its meaning from the context in which it is used. A logical argument could be made, therefore, that the pronoun "another," as incor-

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2. WEBSTER'S COLLEGIATE DICTIONARY, Random House, 1992.

porated by § 1346 into § 1343, would have the same meaning as the lists of nouns incorporated into § 1343 by Title 1, § 1 definition of "whoever." If this second insertion is made, the first portion of § 1343 (wire fraud) reads as follows:

> [Any person, individual, corporation, company, association, firm, partnership, society or joint stock company who], having devised or intending to devise any scheme or artifice [to deprive any other person, individual, corporation, company, association, firm, partnership, society or joint stock company of the intangible right of honest services] etc.

With these insertions, § 1343 as amended by § 1346 can certainly be read to clearly define the deprivor and the deprivee, setting aside for the time being the definitional problem of what constitutes a "deprivation of an intangible right of honest services." But these insertions do not solve the interpretation problem in this case, because the indictment charged Brumley with conspiring to defraud and defrauding "the citizens of the State of Texas, including members of the Texas Industrial Accident Board, an agency of the State of Texas, from receiving the intangible right to honest services." and defrauding "the citizens of the State of Texas including the Industrial Accident Board and its successor (the Texas Workman's Compensation Commission), a state agency, of the intangible right to good, faithful and honest service." There is nothing in the definition of "whoever" in § 1 of Title 1 which could even remotely be interpreted or construed to mean "a state," "the citizens of a state," "a political subdivision of a state," "a governmental agency," or "an employee or official of a govern-mental agency." Moreover, the majority opinion impliedly concedes that none of the nouns listed in the definition of § 1 of Title 1 could be construed to include a "state or state agency" when it states that "the statute does not allow prosecution of a state or state agency." Maj. Op. at 3839.

The answers to the questions "What is an intangible right?", "What are honest services?," and what is "the intangible right of honest services" are not clear nor is their meaning readily available to the average citizen. The term "intangible right" is not defined in the United

States Code, is not defined in BLACK'S LAW DICTIONARY, and, prior to its use in § 1346, had never been used in any other statute of the United States. The term "honest services" is not defined anywhere in the United States Code, is not defined in BLACK'S LAW DICTIONARY, and had never been used in the United States Code prior to its use in § 1346. The phrase "the intangible right of honest services" is, therefore, inherently undefined and ambiguous. There is no listing in the United States Code of all "intangible rights;" therefore, there is nothing which could be identified as "the intangible right of honest services."

It is therefore incomprehensible to us that the majority can conclude, as it must in order to uphold this conviction, that the inclusion of the words "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services," reflects a clear statement of a Congressional intention to protect the citizenry of a state from corrupt state officials. Given this certain ambiguity of statutory words, there is surely no call for us to proceed further into legislative history to demonstrate that Congress has failed to satisfy the requirements delineated in *Bass* and *Ashcroft*. Nonetheless, the egregious error of the majority in applying this statute to the instant facts is emphasized by reference to legislative history. The legislative history demonstrates conclusively that the United States House of Representatives was unwilling to pass a criminal statute to reach the conduct alleged in the instant indictment.

LEGISLATIVE HISTORY

The specific text of what has become 18 U.S.C. § 1346 was inserted in the Omnibus Drug Bill for the first time on the very day that the Omnibus Drug Bill was finally passed by both the House and the Senate.[3] The text of what is now § 1346 was never included in any bill

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3. For an excellent discussion of the legislative history of § 1346, see Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S.CAL. L. REV. 367, 487-91 (1989).

as filed in either the House of Representatives or the Senate. As a result, the text of § 1346 was never referred to any committee of either the House or the Senate, was never the subject of any committee report from either the House or the Senate, and was never the subject of any floor debate reported in the Congressional Record.

There are only two items of legislative history pertinent to the text of § 1346 as actually passed. First, there are remarks on the floor of the House entered by Representative Conyers regarding various provisions in the Omnibus Drug Bill, including the section of that bill which added the new § 1346 to Title 18. After describing the Supreme Court decision in *McNally* and its effect on various prior federal Circuit Court opinions, Representative Conyers stated:

> This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. The amendment also applies to the wire fraud provision and precludes the *McNally* result with regard to that provision.
>
> The amendment adds a new section to 18 U.S.C. 63 that defines the term "scheme or artifice to defraud to include a scheme or artifice to defraud another of the intangible right of honest services." *Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property.* This amendment is intended merely to overturn the *McNally* decision. *No other change in the law is intended.*

134 Cong. Rec. H11,108-01 (daily ed. Oct. 21, 1988) (emphasis added).

It is significant that in this statement Representative Conyers does not use the word "state," nor the words "citizens of a state," nor the words "state official," nor the words "public official," nor the words "state employee." What Representative Conyers does refer to as the change made by the amendment is that it eliminates the necessity "to

determine whether or not the scheme or artifice to defraud involved money or property."[4]

Second, several weeks *after the passage* of the Omnibus Drug Bill, the Senate Judiciary Committee prepared and entered into the Congressional Record a report regarding all of the provisions in the Anti-Drug Abuse Act of 1988 which were within the jurisdiction of the Senate Judiciary Committee, for the purpose of detailing "Congress' intent in enacting these provisions." Regarding the text of what is now 18 U.S.C. § 1346, this report states as follows:

> Section 7603. Intangible Rights for Mail and Wire Fraud.
>
> This section overturns the decision of *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials.[5] The intent is to reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change.[6]

134 Cong. Rec. S17,360-02 (daily ed. Nov. 10, 1988) (footnotes added).

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4. In the case of Representative Conyers' remarks, affording them *any* weight is dubious, as he voted *against* the final omnibus drug bill. *See* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 Harv. J. Leg. 153, 169 n. 69 (1994). Likewise, there is nothing in the Congressional Record which identifies Representative Conyers as the sponsor of this amendment.

5. The phrase "including the right of the public to the honest services of public officials" in this report is pure conjecture at best. Surely the staff of the Senate Judiciary Committee knew that Section 2 of S2793 (public corruption) was rejected by the House of Representatives. See our discussion of S2793 hereinafter.

6. The majority correctly notes that the pre-*McNally* case law was "uneven" and was "not a unified set of rules." Therefore, the federal statute could not have intended to "reinstate all of the pre-*McNally* case law." To do so would have required a truly extraordinary statute, in which the substantive force of the statute varied in each judicial circuit.

Such post-enactment legislative history, however, is not entitled to great weight. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, 100 S.Ct. 2051, 2061, 64 L.Ed.2d 766 (1980). Moreover, additional legislative history reveals that, on at least two occasions, Congress was unwilling to specifically enact a statute that expressly spoke to the conduct of public officials. The first such occasion was H.R. 3050, 100th Cong., 1st Sess., filed July 29, 1987, which provided for the addition of a new section in Chapter 63 of Title 18 of the United States Code, which would have read:

> Section 1346. Definition of Defraud for Certain Sections.
>
> As used in Sections 1341 and 1343, the term "defraud" includes the defrauding of the citizens of a body politic—
>
> 1. of their right to the conscientious, loyal, faithful, disinterested and unbiased performance of official duties by a public official thereof; or
>
> 2. of their right to have the public business conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct and fraud.

This bill was referred to the House Committee on the Judiciary *but was never further acted upon in any way.* Had this bill become law, Congress would have declared in clear and unmistakable language that the "citizens of a body politic" are protected by federal law from dishonest public servants.

Second, the most comprehensive vehicle by which Congress sought to change the *McNally* decision in a manner sufficient to satisfy the tests of *McNally* was Senate Bill 2793 (S2793), titled the "Anti-Corruption Act of 1988." This bill was introduced in the Senate on September 7, 1988, referred to the Judiciary Committee, reported favorably by that committee without a report, and passed later by the Senate on October 14, 1988. This bill was then sent to the House of Representatives, where it was referred to the House Judiciary Committee on October 19, 1988. Concurrently with its passage by the Senate, S2793 was designated by a unanimous consent agreement of the Senate as one of a large number of amendments to "comprise the joint

leadership package" which would be attached as amendments to H.R. 5210, the Drug Initiative Act of 1988, Omnibus,[7] which was then before the Senate, having earlier been passed by the House. H.R. 5210 (with S2793 included) was then passed by the Senate and sent back to the House. On October 22, 1988, the House of Representatives reconsidered H.R. 5210 with the leadership package of amendments attached in the Senate and made various amendments thereto, and then passed the revised bill. One of the amendments made by the House of Representatives was to delete the text of S2793 and substitute in its place the language which now appears codified as 18 U.S.C. § 1346. H.R. 5210 as then amended was sent back to the Senate, which concurred in those amendments later on October 22, 1988.

Because of the direct relevance of S2793 to the text of what was ultimately passed as 18 U.S.C § 1346, a copy of that bill is appended as an addendum to this dissent. Section 2 of this bill (pages 1-6 of addendum) would have created a new Section 225, entitled "Public Corruption," to be inserted in Chapter 11 of Title 18 of the United States Code. This new section would make criminal: (a) depriving or defrauding the inhabitants of a state or a political subdivision of a state of the honest services of an official or employee of such state or subdivision and (b) depriving or defrauding the inhabitants of a state or political subdivision of a state of a fair and impartially conducted election process in any primary, runoff, special or general election. On its face Section 2 of S2793 would have been a fairly comprehensive, articulate and clear attempt to define criminal conduct which would satisfy the requirements of *McNally* that the Congress speak "more clearly than it has" and, in the area of federal/state relations, that Congress clearly express its intent to affect such relations. If Section 2 of S2793 had been adopted by the House of Representatives, there would not now be any need for determining whether the word "another" means a "state or a political subdivision of a state." There is no report in the

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7. It should be noted that H.R. 5210 as previously passed by the House did *not* contain any section dealing with the *McNally* decision nor the concept of "honest servcies."

legislative history explaining why the House of Representatives declined to accept the full text of S2793 as part of the omnibus Anti-Drug Act of 1988 (H.R.5210).

We may conclude from the demise of these more comprehensive bills (H.R. 3050 and S2793) that the House of Representatives was unwilling to join the Senate in the comprehensive definition of crime involving "public corruption" as set forth in Section 2 of S2793.

Section 3 of S2793, entitled "White Collar Crime," contemplated the addition of a new § 1346, entitled "Scheme or Artifice to Defraud," which would be added to Chapter 63 of Title 18 of the United States Code. It is apparent that Section 3 of S2793 is a progenitor in some respects of the text of 18 U.S.C. § 1346, which was ultimately adopted by both Houses. Change the word "organization" to "another" and put a period after the words "honest services," and one has the text of what was ultimately passed.

The legislative history likewise does not reveal any report or statement as to why the House of Representatives opted to make the changes it made in the portion of Section 3 of S2793 which the House of Representatives retained as Section 7603 of the Omnibus Crime Bill. The world "organization" is defined in Section 18 of Title 18 as meaning "a person other than an individual." The substitution of the pronoun "another" for the noun "organization" would work some enlargement of the class of potential victims, since the word "organization" by definition does not mean individual persons. But the critical question to our inquiry here is whether simply by making this one word change the House intended to accomplish the same results that would have been accomplished if Section 2 of S2793 had also been adopted. Simply to pose the question is to answer it. If the House of Representatives truly agreed with the Senate that "depriving the inhabitants of a state or political subdivision of a state of the honest services of an official or employee of such state or subdivision" should become a federal crime when use was made of the mails or interstate wire, radio or television communications, then the clearest and most comprehensive way to do that (and satisfy the Supreme Court's tests in

McNally) would have been to adopt the entirety of Section 2 of S2793. The House of Representatives was unwilling to do that.[8]

Given this legislative history, the following conclusions must be drawn:

1. Both the House and the Senate certainly knew how to "speak clearly and definitively" on the subject of fraud depriving the citizens of a state or political subdivision of the intangible right of good and honest government, but the House refused to do so; and

2. None of the bills containing any such express provisions received a majority vote of both houses of Congress. Instead, what was passed by both houses of Congress was a last minute, "bobtailed" compromise which had never been the subject of hearing in either house.

The wording of § 1346 simply does not effect a change in the portion of the *McNally* opinion which held that the mail fraud statute

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8. A conclusion that the House of Representatives during the 100th Congress in 1988 was consciously unwilling to pass Section 2 of S2793 is corroborated by two other sources. First, the Public Integrity Section of the Department of Justice stated in its 1988 Report to Congress:

> Also, the Section pushed for and ultimately obtained congressional attention to the obstacle to effective corruption prosecution posed by the Supreme Court decision in *McNally v. United States.* That decision largely invalidated the use of the mail fraud statute to combat state and local corruption. *Unfortunately, the legislation passed by Congress in 1988 did not completely address the problems posed by the McNally decision, and the Section will continue its efforts to see that this valuable weapon against corruption is restored.* (Emphasis added).

Second, in subsequent Congresses, the Senate passed and included in its version of various crime bills provisions almost verbatim the same as the provisions of Section 2 of S2793. *See* 135 Cong. Rec. S12,430-32 (daily ed. Oct 3, 1989) (statement of Sen. Biden); 136 Cong. Rec. S6638-39 (daily ed. May 21, 1990) (statement of Sen. Biden); 137 Cong. Rec. S9382-83 (daily ed. July 9, 1991); 138 Cong. Rec. S6911-03 (daily ed. May 19, 1992). But none of these bills passed by the Senate were ever adopted by the House of Representatives.

does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government." The legislative history reinforces this view.

SECTION 1346 FAILS TO GIVE NOTICE

The majority opinion seems to make the test of "speaking more clearly" simply Congress' evidencing an intention to overrule *McNally*. But overruling *McNally* does nothing to place in the statutory language the necessary words, phrases and language which would notify the average citizen that these statutes have been dramatically extended to include conduct and activities not previously stated therein. Clearly, when the Supreme Court decided *McNally*, all of the preexisting Circuit Court constructions, interpretations and applications went down the drain; the convictions of many defendants who had been prosecuted under the pre-*McNally* law had to be vacated, and conduct occurring prior to the effective date of § 1346 could no longer be prosecuted under the old law.

McNally placed the burden on Congress to put down in statutory form whatever expanded scope it chose to give to the fraud statutes. In effect, Congress was charged with codifying in statutory form the definitions of the conduct which would be prohibited by the concepts of "intangible rights," "honest services," and "good and honest government," and to expressly indicate whether Congress intended to extend these concepts to the conduct of state officials. The requirement imposed by the Supreme Court to speak more clearly was not for the benefit of the Circuit Courts which had, in fact, given birth to these concepts in the first place. Rather, the requirement to speak more clearly, in addition to addressing federalism concerns, was for the benefit of the public, the average citizen, the average mid-level state administrator like Brumley, who must be forewarned and given notice that certain conduct may subject him to federal prosecution. The staff of the Senate Judiciary Committee and the Department of Justice clearly understood these requirements and drafted S2793 (see addendum) which would satisfy them. This bill passed the Senate, but the House

was unwilling to specifically regulate the conduct of state officials. In its place, the House substituted a one-sentence statement that did not define the word "another," did not define the term "intangible right," and did not define the term "honest services." It is difficult to understand how the majority can conclude that the statutory language of § 1346 "plainly reaches state officials such as Brumley."

HONEST SERVICES

Finally, we have to register our disagreement with the fundamental premise upon which the majority opinion seems to be based, i.e., that Congress can delegate to the federal courts the task of defining the key terms and coverage of a criminal statute. We have found no Supreme Court case which supports that proposition, and the majority opinion cites no authority, either constitutional, statutory or decisional, for that premise. The majority pays lip service to the principle that Congress must define the criminal conduct when it states:

> We will not lightly infer that Congress intended to leave to courts and prosecutors, in the first instance, the power to define the range and quality of services a state employer may choose to demand of its employees.

Maj. Op. at 734. Surprisingly, the majority flatly contradicts itself when it states that the passage of § 1346 has set the Courts "back on a course of defining honest services, and we turn to that task." As stated earlier, research indicates that the term "honest services" has never been used by the United States Congress in any statute prior to its use in § 1346, and that the term is nowhere defined by Congress. Likewise, there is nothing in the words of the statute itself nor in any of the legislative history of § 1346 which would indicate any Congressional intent to delegate to the Courts the task of defining the words "honest services," even if Congress could constitutionally do so.

The majority's attempt to define "honest services" demonstrates why such ad hoc definitions cannot possibly satisfy the requirements of "fair notice" to our fellow citizens as to where the line between per-

mitted and prohibited conduct is drawn. On the one hand, the majority says that "the statute contemplates that there must first be a breach of a state owed duty," but on the other hand, it states that "the mere violation of a gratuity statute, even one closer to bribery than the Texas statute, will not suffice." Likewise, at one point the majority states that "we do not reach the question of whether a breach of duty to perform must violate the criminal law of the state," but in another point the majority supports its evidentiary analysis by saying that "Brumley violated a Texas criminal statute." Finally, at two points the majority recognizes that the case law on "honest services" prior to *McNally* was "not a unified set of rules" and was "uneven." From its review of the pre-*McNally* cases, the majority found "two uncertainties regarding the draw by this federal statute upon state law, specifically in defining the statutory element of honest services." Maj. Op. at 733. It is obvious, therefore, that the majority has recognized that the term "honest services" has not achieved the status of a commonly accepted and recognized term or art which Congress could have been relying upon in using these words. The majority makes a labored effort to infuse some sort of meaning to these words; but in truth and in fact, the majority finds that meaning in its own subjective notions and not in the words of Congress.

CONCLUSION

Because our colleagues in the majority (1) have closed their eyes to obvious ambiguities in the text of 28 U.S.C. § 1346; (2) have chosen to completely ignore and avoid the legislative history of § 1346 which that undermines the majority's conclusion; (3) have concluded, without analysis of reference to any principles of statutory construction, that § 1346 "plainly reaches state officials such as Brumley;" and (4) now legislate the definition of honest services, we find ourselves in total and fundamental disagreement with the majority opinion. We therefore respectfully dissent.

ADDENDUM

100TH CONGRESS
2D SESSION

S.2793

To amend title 18 of the United States Code to punish corruption.

IN THE SENATE OF THE
UNITED STATES

SEPTEMBER 15 (legislative day,
SEPTEMBER 7), 1988

Mr. BIDEN (for himself, Mr. McCONNELL, Mr. METZENBAUM, Mr. SIMON, Mr. THURMOND, and Mr. DeCONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18 of the United States
Code to punish corruption.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Anti-Corruption Act of 1988".

SEC. 2. OFFENSE.

Chapter 11 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 225. Public Corruption

"(a) Whoever, in a circumstance described in subsection (c), deprives or defrauds, or attempts to deprive or to defraud, by any scheme or artifice, the inhabitants of a State or political subdivision of a State of the honest services of an official or employee of such State or subdivision, shall be fined under this title, or imprisoned for not more than ten years (or, if the defendant intended that the scheme or artifice promote conduct constituting an offense under the laws of the United States or a State for which the maximum term of imprisonment is greater than ten years, shall be imprisoned as required or authorized by the law punishing such offense of for not more than twenty years, whichever is less), or both.

"(b) Whoever, in a circumstance described in subsection (c), deprives or defrauds, or attempts to deprive or to defraud, by any scheme or artifice, the inhabitants of a State or political subdivision of a State of a fair and impartially conducted election process in any primary, run-off, special, or general election, through the procurement, casting, or tabulation of ballots or voter registration forms which are false, fictitious, fraudulent, or illegal under the laws of the State in which the election is held, or through the filing of any false, fictitious or fraudulent report required to be filed under State law regarding an election campaign, shall be fined under this title or imprisoned for not more than ten years, or both.

"(c) The circumstances referred to in sub-sections (a) and (b) are that—

"(1) for the purpose of executing or concealing such scheme or artifice or attempting to do so, the actor—

"(A) places in any post office of authorized depository for mail matter, any matter or thing whatever to be sent or

delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing:

"(B) transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce any writings, signs, signals, pictures, or sounds;

"(C) transports or causes to be transported any person or thing, or induces any person to travel in or be transported in, interstate or foreign commerce; or

"(D) uses any facility of interstate or foreign commerce; or

"(2) the scheme or artifice affects in any manner or degree, or would if executed or concealed so affect, interstate or foreign commerce.

"(d) Whoever deprives or defrauds, or attempts to deprive or defraud, by any scheme or artifice, the inhabitants of the United States of the honest services of a public official or person who has been selected to be a public official shall be fined under this title or imprisoned for not more than ten years (or, if the defendant intended that the scheme or artifice promote conduct constituting an offense under the laws of the United States or a State for which the maximum term of imprisonment is greater than ten years, shall be imprisoned as required or authorized by the law punishing such offense, or for not more than twenty years, whichever is less), or both.

"(e) Whoever being an official, or public official, or person who has been selected to be a public official, directly or indirectly, discharges, demotes, suspends, threatens, harasses, or, in any manner, discriminates against any employee or official of the United States or any State or political subdivision of such State, or attempts to do so, in order to carry out or to conceal any scheme or artifice described in this section, shall be fined under this title or subject to imprisonment of up to five years or both.

"(f) (1) Any employee or official of the United States or any State or political subdivision of such State who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against because of lawful acts done by the employee as a result of a violation of subsection (e) or because of actions by the employee on behalf of himself or others in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such a prosecution) may in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

"(2) An individual is not eligible for such relief if that individual participated in the violation of this section with respect to which such relief would be awarded.

"(g) For purposes of this section—

"(1) the term 'State' means a State of the United States, the District of Columbia, Puerto Rico, and any other territory or possession of the United States;

"(2) the term 'agency' means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established and subject to control by a government or governments for the execution of a governmental or intergovernmental program;

"(3) the terms 'public official' and 'person who has been selected to be a public official' have the meaning set forth in section 201 of this title; the terms 'official', 'public official', and 'person who has been selected to be a public official' shall also include any person acting under color of official authority;

"(4) the term 'official' includes a person who has been nominated or appointed to be an official or who has been officially informed that he or she will be so nominated or appointed, and includes any official of an Indian tribal government".

SEC. 3 WHITE COLLAR CRIME.

Chapter 63 of Title 18 of the United States Code is amended by adding a new section as follows:

"§ 1346. Scheme or artifice to defraud

"For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive an organization of the intangible right of honest services in which the defendant received or attempted to receive, for the defendant or another person, anything of value or in which the defendant intended or contemplated loss or harm to the organization".

SEC. 4. TECHNICAL AND CONFORMING AMENDMENTS.

(a) TABLE OF SECTIONS.— The table of sections for chapter 11 of title 18, United States Code, is amended by adding at the end thereof the following item:

"225. Public Corruption".

(b) TABLE OF SECTIONS.—The table of sections for chapter 63 of title 18, United States Code, is amended by adding at the end thereof the following item:

"1346. Scheme or Artifice To Defraud".

(c) RICO.—Section 1961(1) of title 18, United States Code, is amended by inserting "section 225 (relating to public corruption)," after "section 224 (relating to sports bribery),".

(d) INTERRUPTION OF COMMUNICATIONS.—
Section 2516(1)(c) of title 18, United States Code, is amended by inserting "section 225 (relating to public corruption)," after "section 224 (bribery in sporting contests),".

SEC. 5. INTERSTATE COMMERCE.

(a) IN GENERAL.—Section 1343 of title 18, United States Code, is amended by striking "transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds" and inserting "uses or causes to be used any facility of interstate or foreign commerce".

(b) CONFORMING AMENDMENTS. —(1)The heading of section 1343 of title 18, United States Code, is amended by striking "Fraud by wire, radio, or television" and inserting "Fraud by use of facility of interstate commerce".

(2) The chapter analysis for chapter 63 of title 18, United States Code, is amended by striking the analysis for section 1343 and inserting the following:

"1343. Fraud by use of facility of interstate commerce"

APPENDIX E

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.
(Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523; Aug 9, 1989, Pub.L. 101-73, Title IX, § 961(i), 103 Stat. 500; Nov. 29, 1990, Pub.L. 101-647, Title XXV, § 2504(i), 104 Stat. 4861.)

EDITORIAL NOTES

Separability of Provisions. If any provision of Pub.L. 101-73 or the application thereof to any person or circumstance is held invalid, the remainder of Pub.L. 101-73 and the application of the provision to other persons not similarly situated or to other circumstances not to be affected thereby, see section 1221 of Pub.L. 101-73, set out as a note under section 1811 of Title 12, Banks and Banking.

§ 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.
(Added Pub.L. 100-690, Title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.)

§ 36.08. Gift to Public Servant by Person Subject to His Jurisdiction

(a) A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

(b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency.

(c) A public servant in an agency carrying on civil or criminal litigation on behalf of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.

(d) A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.

(e) A public servant who has judicial or administrative authority, who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decision, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.

(f) A public servant who is a member of or employed by the legislature or by an agency of the legislature commits an offense if he solicits, accepts, or agrees to accept any benefit from any person.

(g) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan 1, 1974. Amended by Acts 1975, 64th Leg., p. 915, ch. 342, § 11, eff. Sept 1, 1975; Acts 1983, 68th Leg., p. 3238, ch. 558, § 5, eff. Sept 1, 1983.

For saving provisions see note set out under Section 1.07.

For applicability of change in law made by 1983 amendatory act to offenses committed before effective date of act, see note under § 36.01.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	§	CRIMINAL DOCKET
	§	NUMBER:
	§	1:93-cr-110-1
VS	§	
	§	BEAUMONT, TEXAS
	§	
MICHAEL B. BRUMLEY,	§	DECEMBER 10, 1993
DEFENDANT	§	11:00 A.M.

TRANSCRIPT OF:
EXCERPTS OF MOTIONS HEARING
BEFORE THE HONORABLE WENDELL C. RADFORD
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE GOVERNMENT: MR. L. STUART PLATT
A.U.S.A.
110 NORTH COLLEGE, SUITE 700
TYLER, TEXAS 75702

FOR THE DEFENDANT: MR. GEORGE M. JAMAIL
ATTORNEY AT LAW
P.O. BOX 4915
BEAUMONT, TX 77704-4915

COURT REPORTER: WENDELL R. PARKS, CP, CM
FEDERAL COURT REPORTER
217 FEDERAL COURTHOUSE
BEAUMONT, TEXAS 77701

DEFENDANT EXHIBIT1

MR. JAMAIL: WELL, I'M CONCERNED AS TO MR. CELY, AND, IN ADDITION, THE OTHER LAWYERS TOO.

THE COURT: OKAY. THAT'S DIFFERENT.

MR. PLATT: BUT THERE WAS AN EMPHASIS UPON THE OTHER LAWYERS.

—THAT I DO NOT AT THIS TIME INTEND TO PRODUCE ANY TANGIBLE OBJECTS REGARDING A QUID PRO QUO IN EXCHANGE FOR WHATEVER GRATUITIES, BENEFITS OR MONIES THAT MR. BRUMLEY RECEIVED; THAT MY POSITION IS THAT THE QUID PRO QUO IS INTANGIBLE, SUCH AS FAVORITISM OR OTHER TYPES OF INTANGIBLE MATTERS.

MR. JAMAIL: WELL, JUST SO I CAN MAKE THIS CLEAR, IT'S MY UNDERSTANDING, AND I THINK WE'VE AGREED, THAT THERE IS NOT GOING TO BE A CONTENTION THAT ANY BOARD AWARD WAS ENHANCED OR ANY CLAIMANT WAS AWARDED MORE MONEY, OR ANY CLAIMANT, ANY LAWYER WAS REFERRED ANY CASE IN RETURN FOR MONEY.

MR. PLATT: WELL, I THINK —

MR. JAMAIL: I MEAN, AM I CORRECT IN THAT?

MR. PLATT: YOU'RE USING THE WORD CONTENTION VERSUS EVIDENCE. OKAY?

MR. JAMAIL: NO. OKAY. I'M TALKING ABOUT EVIDENCE.

MR. PLATT: IT'S MY POSITION THAT WE DO NOT NOT INTEND TO OFFER EVIDENCE THAT "X" CLAIMANT WAS REFERRED OR "X" CLAIMANT RECEIVED A HIGHER AWARD. OKAY?

MR. JAMAIL: OR THAT "X" LAWYER RECEIVED SOME TYPE OF TANGIBLE BENEFIT, FOR INSTANCE, A HIGHER ATTORNEY FEE OR SOMETHING?

MR. PLATT: THAT'S CORRECT. THE PROBLEM IS, ALL OF THESE ATTORNEYS RECEIVED SUBSTANTIAL FEES IN THE PROCESS OF THE NORMAL WORKERS' COMPENSATION PROCEDURE.

MR. JAMAIL: I DON'T HAVE A — OKAY.

THE COURT: I UNDERSTAND WHAT YA'LL ARE SAYING.

MR. PLATT: IF THERE'S ANY NEWLY-DISCOVERED, BECAUSE WE CONTINUE TO PRETRIAL WITNESSES, EXHIBITS OR ITEMS THAT I BELIEVE EITHER FALL UNDER THE AGREEMENT WE'VE REACHED HERE ON THESE MOTIONS OR FALL IN THE CATEGORY OF BEING POTENTIAL EXHIBITS, THEN I WILL IMMEDIATELY SHIP THOSE TO COUNSEL, COPIES OF THOSE TO COUNSEL.

THE COURT: OKAY.

MR. PLATT: IF IT FALLS AFTER THE 23RD, BECAUSE I'M PRETRIALING A WITNESS FOR THE FIRST TIME AND I SEE A DOCUMENT, HE'LL GET IT IMMEDIATELY.

IS THAT PRETTY MUCH THE SUM AND SUBSTANCE OF OUR AGREEMENT?

MR. JAMAIL: YEAH, THAT TAKES CARE OF ALL THE MATTERS WHICH WE'VE AGREED UPON IN THE FORM OF DISCOVERY, AND BOTH SIDES ASK THAT WE BE GIVEN A RECORD OF THIS

APPENDIX G

CLOSING STATEMENT

Page 2

GOVERNMENT EXHIBIT 143
Pg 1 of 3
1-25-94

Client: **Beverly Michelle Burch**

Deductions

Gross Settlement		$3,500.00
Less:		
(1) Attorney Fee - 25%	875.00	
(2) Expenses-medical records		
(3) Advances	.00	
(4) Miscellaneous	136.03	
Eckerd Drugs - 121.03		
Doctors Medical Center - 15.00		
Total Expenditures to be Withheld from Settlement		$1,136.03
NET SETTLEMENT TO CLIENT		$2,363.97

Date: 11-11-87

/s/Michelle Burch
(Signed for Identification)

CLOSING STATEMENT

Client: **Beverly Michelle Burch**

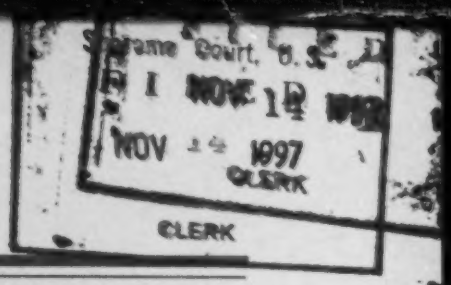
Deductions

Gross Settlement		$3,500.00
Less:		
(1) Attorney Fee - 25%	875.00	
(2) Expenses-medical records	125.00	
(3) Advances	.00	
(4) Miscellaneous	136.03	
Eckerd Drugs - 121.03		
Doctors Medical Center - 15.00		
Total Expenditures to be Withheld from Settlement		$1,136.03
NET SETTLEMENT TO CLIENT		$2,363.97

Date: 11-11-87

/s/Michelle Burch
(Signed for Identification)

(3)



No. 97-486

In the Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL BRYANT BRUMLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

17 pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346 extends the reach of the wire fraud statute to encompass deprivation of the right to honest governmental services.

2. Whether petitioner's prosecution exceeded Congress's power under the Commerce Clause, and whether petitioner's conviction is inconsistent with the Tenth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-486

MICHAEL BRYANT BRUMLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 41a-84a) is reported at 116 F.3d 728. Prior opinions of a panel of the court of appeals (Pet. App. 1a-13a, 14a-38a) are reported at 59 F.3d 517 and 79 F.3d 1430.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1997. The petition for a writ of certiorari was filed on September 15, 1997, and was placed on the Court's docket on September 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Eastern District of Texas, petitioner was convicted on one count of conspiring to commit mail fraud and wire fraud (18 U.S.C. 371, 1341, 1343, and 1346); three counts of wire fraud (18 U.S.C. 1343 and 1346); two counts of money laundering (18 U.S.C. 1956); and two counts of making false statements to a financial institution (18 U.S.C. 1014). He was sentenced to 48 months' imprisonment, to be followed by three years' supervised release. A panel of the court of appeals reversed his conspiracy, wire fraud, and money laundering convictions but affirmed his false statements convictions. Pet. App. 1a-13a, 14a-38a. On rehearing en banc, the court of appeals affirmed his convictions. Pet. App. 41a-84a.

1. From July 1976 until July 1988, petitioner was a pre-hearing examiner for the Texas Industrial Accident Board (IAB), which handled workers' compensation cases. In July 1988, he was promoted to a regional director at the IAB. In 1990, the state legislature changed the process for handling workers' compensation claims and reorganized the IAB into the Texas Workers' Compensation Commission (TWCC). Petitioner was promoted to Regional Associate Director for the TWCC. Pet. App. 5a, 17a-18a, 46a; Gov't C.A. Br. 3-4. His duties included identifying lawyers and insurance companies who failed to follow IAB or TWCC rules and regulations. Pet. App. 46a.

Petitioner was unable to live within his income. As early as 1982, he started asking for loans from attorneys who represented workers' compensation claimants. Pet. App. 46a. By 1988 petitioner had borrowed money from at least eight lawyers. One of

them was co-defendant John M. Cely, a lawyer whose firm had a substantial workers' compensation practice; Cely and members of his firm made frequent appearances before petitioner in workers' compensation cases. *Id.* at 47a. From July 1987 until May 1992, Cely made approximately 70 wire transfers through a Western Union office outside of Texas involving an aggregate of over $86,700. *Ibid.*; Gov't C.A. Br. 4. Ostensibly, those payments were "loans," but they were never repaid. *Ibid.* Petitioner also "borrowed" approximately $25,000 from other lawyers. Pet. App. 47a.

In 1988, during the time that Cely was paying petitioner, the IAB began an investigation of Cely because of a written complaint filed by one of Cely's former clients. Petitioner several times urged the IAB to reconsider its decision to investigate Cely. Pet. App. 6a, 18a; Gov't C.A. Br. 5. Petitioner also told Cely how to modify documents from other cases that the IAB had subpoenaed from Cely. Pet. App. 6a; Gov't C.A. Br. 7. Further, petitioner aided Cely in his attempt to lease office space to TWCC, which was in violation of TWCC ethical guidelines. Pet. App. 6a; Gov't C.A. Br. 7-8.

2. On appeal, petitioner argued inter alia that his indictment, which charged him with defrauding "the citizens of the State of Texas, including the Texas Industrial Accident Board and [the TWCC], a State agency, of the intangible right to good, faithful and honest service," (Superseding Indict., Counts 2-4, Wire Fraud, ¶ 2) did not state a crime under Sections

1343 and 1346,[1] the latter of which was enacted after this Court's decisions in *McNally* v. *United States*, 483 U.S. 350 (1987), and *Carpenter* v. *United States*, 484 U.S. 19 (1987). In its initial decision, the court of appeals held that there was insufficient evidence that petitioner caused interstate wire transfers. The court therefore reversed petitioner's convictions, with the exception of his false statements convictions, on sufficiency of the evidence grounds. Pet. App. 7a-12a. The panel then vacated that decision and, in a divided decision, held that the wire fraud statute did not reach petitioner's conduct because Section 1346 did not apply to schemes to deprive state governments of intangible rights. Pet. App. 14a-37a. Judge Wood dissented; he would have held that the amendment to the definition of a scheme to defraud for purposes of mail and wire fraud statutes contained in Section 1346 meant that petitioner's conduct did violate the wire fraud statutes. *United States* v. *Brumley*, 79 F.3d 1430, 1452 (5th Cir. 1996).[2]

The court of appeals then granted rehearing en banc and reinstated petitioner's wire fraud, conspiracy, and money laundering convictions. Pet. App. 41a-56a. The en banc court rejected petitioner's argument that Section 1346 does not apply to schemes to deprive an entity of state government of the in-

---

[1] Section 1346 added a definitional provision applicable to the mail and wire fraud statutes, Sections 1341 and 1343. Section 1346 states:

> For the purposes of this Chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

[2] The appendix to petitioner's petition for a writ of certiorari does not contain Judge Wood's dissent.

tangible right to honest services. The en banc majority first held that the term "another" in Section 1346 includes a governmental entity, because, the court reasoned, "another" defines the range of victims, not the perpetrator of the crime. Pet. App. 48a-49a. The court also rejected petitioner's argument that Section 1343 and Section 1346 do not reach abuses of state office involving the deprivation of intangible rights. The court determined that Congress, in enacting Section 1346, intended to reverse the holding in *McNally* and to provide "that the fraud statutes cover deprivations of intangible rights" such as were involved here. *Id.* at 50a.

The court also held that the statutory term "honest services" includes "honest and impartial government." Pet. App. 48a. In reaching that conclusion, the court determined that, "[u]nder the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law[,]" *i.e.*, that "the official must act or fail to act contrary to the requirements of his job under state law." *Id.* at 53a. In other words, according to the court, if the official does all that is required under state law, an allegation that he did not perform his services "honestly" does not satisfy the mail or wire fraud statutes. *Id.* at 53a-54a. The court also concluded that deprivation of "*citizens*' rights to honest services" would not suffice to make out a violation of Section 1346. *Id.* at 54a.

The court applied those principles to petitioner's conduct and found that he had violated the wire fraud statute. The court found that petitioner, who had adjudicatory authority in a state agency, accepted payments from lawyers who practiced before him and

acted for those lawyers in his official capacity. According to the court, those actions were contrary to petitioner's state law duties and meant that he had deprived his employer[s] of his honest services. Pet. App. 54a. The court also observed that petitioner's actions constituted a violation of state law and of his state law duties, so there was no specter of federal criminalization of conduct that would have been innocent under state law. *Id.* at 54a-56a.

Judges Jolly, DeMoss, and Smith dissented on the ground that, in their view, the statutory language of Section 1346 was not sufficiently clear to cover petitioner's conduct. Pet. App. 56a-78a.

ARGUMENT

1. Petitioner contends (Pet. 7-16) that the court of appeals construed Section 1346 too broadly and that its interpretation conflicts with decisions in other courts of appeals. Contrary to petitioner's claim, the decision below is correct and does not conflict with any other court of appeals' ruling. Further review therefore is not warranted.

a. In *McNally* v. *United States*, 483 U.S. 350, 356 (1987), this Court held that the mail fraud statute applies only to schemes to defraud persons of property rights and not to schemes to defraud them of the intangible right to honest government services. In response to that decision, Congress passed Section 1346, which was enacted to "restore[] the mail fraud provision to where that provision was before the *McNally* decision." Pet. App. 70a (quoting statement of Rep. Conyers).

Petitioner argues (Pet. 8-9) that Section 1346 was not "invited" by *McNally* and does not satisfy that case's supposed requirement that any restoration of

the intangible rights doctrine under the mail fraud statute be clear. Contrary to petitioner's reading of Section 1346, other courts have concluded that Congress plainly intended Section 1346 to reverse *McNally*'s construction of the scope of the mail fraud statute and to restore pre-*McNally* case law. See *United States* v. *Frost*, 125 F.3d 346, 364 (6th Cir. 1997) ("Every court to address the effect of § 1346 has held that it has overruled the holding in *McNally*."); *United States* v. *Grandmaison*, 77 F.3d 555, 566 (1st Cir. 1996); *United States* v. *Waymer*, 55 F.3d 564, 568 n.3 (11th Cir. 1995), cert. denied, 116 S. Ct. 1350 (1996); *United States* v. *DeFries*, 43 F.3d 707, 709 n.1 (D.C. Cir. 1995); *United States* v. *Dischner*, 974 F.2d 1502, 1518 n.16 (9th Cir. 1992), cert. denied, 507 U.S. 923 (1993); *United States* v. *Martinez*, 905 F.2d 709, 715 (3d Cir.), cert. denied, 498 U.S. 1017 (1990). No greater clarity is required to justify application of the mail and wire fraud statute to deprivations of intangible rights.

b. Petitioner also incorrectly argues (Pet. 9-10) that the court below wrongly interpreted the statutory term "another" to include a state governmental entity as a victim of his wire fraud scheme. Section 1346 states that the phrase "scheme or artifice to defraud," as used in the mail and wire fraud statutes, "includes a scheme or artifice to deprive another of the intangible right of honest services." Contrary to petioner's argument, the term "another" in Section 1346 does encompass a State as the victim of a mail or wire fraud scheme. As the Eleventh Circuit recently observed, "[n]either the plain language of section 1346 nor its legislative history supports the limitation" that petitioner urges. *United States* v. *Castro*, 89 F.3d 1443, 1456 (1996), cert. denied, 117 S. Ct. 965

(1997). That court pointed out that, before Section 1346's enactment, the courts had applied the mail fraud statute's protections to state governmental entities. The Eleventh Circuit believed that the same protections should apply under Section 1346, particularly since Congress intended that statute to reinstate pre-*McNally* case law. 89 F.3d at 1456. In light of the statutory language and congressional intent, that conclusion is correct.

c. Petitioner also contends (Pet. 10) that his conviction rests on the appearance of a conflict of interest in violation of a state ethics statute. But the court of appeals specifically found that the government had to prove that "conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law[,]" *i.e.*, that "the official must act or fail to act contrary to the requirements of his job under state law." Pet. App. 53a. According to the court, if the official did all that is required under state law, an allegation that he did not perform his services "honestly" does not satisfy the mail or wire fraud statutes. *Id.* at 53a-54a. The court also said that deprivation of citizens' general rights to honest services from government employees would not suffice. *Id.* at 54a.

Hence, it is clear that the court below did not affirm petitioner's conviction on the basis of an appearance of a conflict of interest. Instead, the court found that petitioner had adjudicatory authority in a state agency, and that he accepted payments from lawyers who practiced before him and acted for those lawyers in his official capacity. According to the court, those actions were contrary to petitioner's state law duties and meant that he provided dishonest services to his employer. Pet. App. 54a. Petitioner accepted $86,780

in payments from Cely, vouched for Cely's good character when Cely was investigated by IAB, and tried to put a stop to the IAB investigation. Petitioner also advised Cely to alter documents so that it would be impossible to detect any wrongdoing. *Id.* at 55a. In addition, petitioner aided Cely's attempt to lease property to the TWCC and discouraged the agency from leasing from another bidder. *Id.* at 56a. Those actions extend far beyond a mere appearance of a conflict of interest.[3]

d. Petitioner is incorrect to assert (Pet. 14-16) that the opinion below conflicts with decisions by other circuits. For example, in *United States* v. *Sawyer*, 85 F.3d 713, 728-729 (1996), the First Circuit held that violation of a state gift statute, which prohibited appearances of—but not actual—corruption,

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[3] For these same reasons, petitioner is wrong when he claims that the court below based his conviction on violations of Tex. Penal Code Ann. § 36.08 (Vernon 1996), which, he claims, prohibits ethical misconduct only and does not require proof of fraudulent intent. See Pet. 12-13. But the district court did not base its findings on petitioner's violation of the Texas statute. Instead, the trial court specifically found that petitioner possessed fraudulent intent (Gov't C.A. Br. 11-13, citing 6 R. 9-12), and the court of appeals agreed. Pet. App. 56a.

Petitioner also argues (Pet. 13-14) that the theories on which the district court and the court of appeals affirmed his convictions constituted a variance from the charges in the indictment. He claims that the indictment charged only ethical violations, but he mischaracterizes the nature of the charges in the indictment. In fact, the indictment alleged that petitioner caused IAB documents to be transferred to Cely, that he showed favoritism to Cely, and that petitioner notified Cely of the IAB investigation of Cely. Superseding Indict., Additional Relevant Facts ¶ B23; Count 1, Manner and Means ¶ 2; Overt Acts ¶ 3.

could not form the basis for a mail fraud prosecution. Consistent with that holding, the court below said that Sections 1343 and 1346 do not reach "a violation of state law that prohibits only appearances of corruption[.]" Pet. App. 53a. Indeed, the court cited *Sawyer* for that proposition. *Ibid.* Hence, the decision below agrees with *Sawyer* rather than conflicts with it. The same is true of *United States* v. *Czubinski*, 106 F.3d 1069 (1st Cir. 1997), on which petitioner bases a claim of a conflict. See Pet. 15. There, the court reversed an IRS employee's wire fraud convictions because, although he had looked at taxpayer files without authorization, he carried out his official tasks properly and there was no proof that he intended to use information in the IRS files for his private purposes, so there was no evidence of a scheme to defraud. *Id.* at 1077. Here, by contrast, petitioner "engaged in a conspiracy in which Cely would give [petitioner] money and [petitioner] would use his position with the IAB and TWCC to assist Cely's dealings with the agency." Pet. App. 56a. That alone demonstrated that petitioner did not fulfill his official tasks.

Petitioner also wrongly argues (Pet. 15) that this case conflicts with *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). In *Rabbitt*, the defendant was a state legislator who, in return for a 10% fee, aided an architectural firm in obtaining state contracts. 583 F.2d at 1020. The award of the contract did not fall within Rabbitt's official duties, however, and the evidence did not demonstrate that he failed to carry out his official legislative duties to aid the architects or that he had an affirmative duty to disclose his interest. Accordingly, the court of appeals held that he had not de-

frauded the citizens of his State of his honest and faithful services. *Id.* at 1026. Here, by contrast, petitioner did have a duty to disclose his relationship with Cely, and he plainly failed to do so. Consequently, the decision below does not conflict with *Rabbitt*.[4]

2. Petitioner also argues (Pet. 16-20) that his conviction is inconsistent with the Tenth Amendment and exceeds Congress's power under the Commerce Clause. Neither of these claims has merit.

Petitioner first claims that his conduct was purely of concern to the State and should not have been the

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[4] Petitioner also cites other cases that he claims stand for a requirement of "some degree of job related self dealing resulting in a profit" before a defendant may be deemed to have violated Section 1346. Pet. 16. In fact, those cases do not support that claim. For example, in *United States* v. *Martinez*, 905 F.2d at 712-715, the issue was whether an unissued state license was property within the meaning of the mail fraud statute, not whether Section 1346 applied. In *United States* v. *Alkins*, 925 F.2d 541, 548-549 (2d Cir. 1991), the issue was whether Section 1346 was improperly applied retroactively, not whether the defendants' actions violated the mail fraud statute as applicable under Section 1346. And *United States* v. *Bryan*, 58 F.3d 933, 940-941 (4th Cir. 1995), does not help petitioner since the court held that the government need not prove a violation of state law. In *United States* v. *Paradies*, 98 F.3d 1266, 1282-1283 (11th Cir. 1996), cert. denied, 117 S. Ct. 2483 (1997), the court found that there was evidence of bribery, but the court did not say that such evidence was required in every case to satisfy Section 1346. In *United States* v. *Castro*, 89 F.3d at 1455-1456, the court rejected the defendants' claim that Section 1346 restricted the reach of the mail and wire fraud statutes to nongovernmental victims. Finally, *United States* v. *Waymer*, 55 F.3d at 568 note 3, merely said that the purpose of Section 1346 was to restore the mail and wire fraud statutes to their pre-*McNally* position.

subject of a federal prosecution. Petitioner claims that if he is "a criminal, he is a criminal only to the extent that the appearance of his conduct was unacceptable to the State of Texas as his employer." Pet. 17. But, as the court of appeals recognized, petitioner's conduct was not innocent under either state or federal law. Pet. App. 55a-56a. As we have shown, petitioner's conduct involved more than a mere appearance of a conflict of interest; instead, he intentionally committed fraud. Under those circumstances, the court below correctly concluded that "[t]he tension inherent in federal criminalization of conduct by state officials innocent under state law is absent here." *Id.* at 55a.[5]

Petitioner also relies on *United States* v. *Lopez*, 514 U.S. 549 (1995), to argue that his wire fraud prosecution exceeded Congress's power under the Commerce Clause. *Lopez* involved the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q); this Court held that that statute was beyond Congress's power under the Commerce Clause. In *Lopez*, the Court observed that "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S. at 561. The Court further noted that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." *Id.* at 562. Those deficiencies in 18 U.S.C. 922(q) are in direct contrast to the express terms of the wire fraud statute, which deals directly with commerce.

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[5] The fact that petitioner's conduct was illegal under both federal and state law also defeats petitioner's Eighth and Ninth Amendment arguments.

Hence, unlike the statute at issue in *Lopez*, which regulated mere possession of an otherwise lawful firearm, the wire fraud statute on its face "addresses a clearly commercial activity that has long been within federal power to regulate." *United States* v. *Tucker*, 90 F.3d 1135, 1140 (6th Cir. 1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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~~NO. 96-1346~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL BRYANT BRUMLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO THE GOVERNMENT'S OPPOSITION

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PETITIONER'S REPLY TO THE GOVERNMENT'S OPPOSITION

During the course of this prosecution, both Brumley and the Government have maintained that the concept and scope of 18 U.S.C. § 1346 is an issue of significant importance.[1] The extent to which § 1346's plain language limits its scope and the external limitations on § 1346's application to the public sector imposed by the Constitution are uncertainties that need to be resolved by this Court in order to give needed direction to Congress, federal prosecutors and, most importantly, the affected public. To let stand a statute which gives a federal prosecutor the discretion to elevate public sector misdemeanor conduct which a state does not deem criminally fraudulent to a federal felony requires an extraordinary diminution of the Tenth Amendment. Extraordinary federal punishment for non-property related conduct by a public sector employee is particularly troubling when viewed in the context of parochial issues and state sovereignty. In today's charged atmosphere of single-issue politics, where accusations of ethical and/or criminal wrongdoing are routinely voiced, it is more important than ever that this Court define the scope of 18 U.S.C. § 1346 because of its potential to render a wide range of public sector conduct violative of federal law that, as here, traditionally had been solely regulated by state law. *Williams v. United States*, 458 U.S. 279, 290 (1982) (citing *United States v. Enmons*, 410 U.S. 396 (1973)); *United States v. Bass*, 404 U.S. 336 (1971). The Government's opposition to Brumley's petition belies its own real need for this Court to comprehensively address the scope and application of the Honest Service Doctrine in the public sector.

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[1] Government's Suggestion for Rehearing En Banc dated August 31, 1995, pg. iv.; and Government's Suggestion for Rehearing En Banc dated May 10, 1996, pg. 1.

§ 1346's Plain Language Internally Limits Its Scope To Circumstances Involving Property Rights

1. The Government's argument that courts have correctly construed that "another" as used in § 1346 includes the citizens of the State of Texas as victims of § 1346's scheme to defraud disregards the fact that these courts addressed § 1346 in circumstances that disclosed bribery and/or Hobbs Act conduct e.g. *United States v. Castro*, 89 F.3d 1443 (11th Cir. 1996). Opp. 7. Cases such as *Castro* stand only for the proposition that the mail and wire fraud statutes are constitutional as applied to public sector deprivation of honest services conduct involving the loss or gain of tangible and intangible property rights. In light of this Court's holding in *Carpenter*, mail and wire fraud do not even require § 1346 in order to reach conduct evidenced in cases like *Castro*. *Carpenter v. United States*, 484 U.S. 19 (1987). Where circumstances disclose bribery, Hobbs Act, or other property directed misconduct in the public sector, the limitations which the Rule of Lenity would place on "another" as used in § 1346 are subsumed because the circumstances inherently disclose property being fraudulently gained or taken. *Brumley II* is the only authority addressing the scope of § 1346 in circumstances devoid of any property right. *United States v. Brumley*, 79 F.3d 1430 (5th Cir. 1996), Pet. App. 14a-38a. The dissent to the *en banc* opinion and *Brumley II* hold that § 1346's scope in the public sector is limited by its plain language and cannot extend the reach of the wire fraud statute to a public sector employee because "another" cannot be construed to include "citizens of the State of Texas." This construction is logically sound because § 1341 and § 1343 are fraud crimes and frauds, in their traditional sense, cannot occur in absence of some property right being lost. Brumley argues that § 1346 can only reach the deprivation of the intangible right to honest services in the public sector where circumstances reveal that the services were fraudulently used for personal gain or harm to a property right.

Public Sector Misconduct Is Not Necessarily Criminally Fraudulent

2. The Government wrongly assumes that § 1346 extends the reach of wire fraud to any job-related statutory violation by a public sector employee. *En banc* Opinion, Pet. App. 54a; Opp. at 7. The *en banc* court and the Government fail to recognize a distinction between public sector misconduct which violates a benign state misdemeanor statute and conduct that intends criminal gain or harm. Contrary to the Government's opposition, all § 1346 case law clearly discloses an intended gain or harm connected with a job activity.[2]

How A Public Sector Employee Rendered Services Should Not Be A Federal Issue

3. The Government relies on the court's findings that Brumley caused IAB documents to be transferred to Cely, that he showed favoritism to Cely, and that Brumley notified Cely of the IAB investigation of Cely as proof that Brumley's "service" was less than expected. Opp. at 9, fn.3. These acts, retrospectively characterized as favoritism and fraudulent conduct, were exactly what Brumley's

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[2] *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996), *cert. pending*, No. 96-1346 (conflict of interest dealing which resulted in commissions); *see also*, *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996); *United States v. Grandmaison*, 77 F.3d 555, 566 (1st Cir. 1996); *United States v. Waymer*, 55 F.3d 564, 568 n.3 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1350 (1996); *United States v. DeFries*, 43 F.3d 707, 709 n.1 (D.C. Cir. 1995); *United States v. Dischner*, 974 F.2d 1502, 1518 n.16 (9th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993); and *United States v. Martinez*, 905 F.2d 709, 715 (3d Cir.), *cert. denied*, 498 U.S. 1017 (1990) as examples of § 1346 application to situations involving tangible and intangible property rights connected to a violation of a job duty. Pre-§ 1346 Honest Service Doctrine case law also indicated that intended harm was a requisite for the application of the Doctrine. *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981), *modified*, 680 F.2d 352 (5th Cir. 1982, Unit B).

job required him to do.[3] Whether "favoritism" ever exists is an extremely subjective inquiry; but, given that the instant case afforded the Government ample opportunity to put forward any insurance company, any injured claimant, any health care provider, or any state official claiming that Brumley's "services" were less than the state required and none were forthcoming, the Government's claim that services were deprived should be foreclosed. Whether Brumley advised Cely how to keep claim settlement records or whether Brumley caused public lease specifications to be sent to Cely are surely not of any federal criminal concern. Had either of these activities concealed a gain or caused anyone a loss, then because of *Carpenter* § 1343 would apply without the necessity of § 1346. In the instant case, the Government simply characterized a public sector employee's day-to-day activities as criminal. This mischaracterization brings into question the permissible limits of the federal government delving into how a public sector employee conducts his duties in circumstances where the conduct does not involve the fraudulent use of the mail or wires. Absent a nexus linking the job activity to the unlawful gain, the Tenth Amendment implications make the exercise of federal jurisdiction over public sector employees impermissible and unwarranted.

A State Employee's Conduct Should Not Be Fraudulent Under Federal Law If It Is Not Fraudulent Under State Law

4. The Government urges that Brumley's federal conviction is consistent with the Tenth Amendment because the Court of Appeals found that Brumley was a criminal under state law. Opp. 12. Brumley concedes that he is guilty of violating a state misdemeanor statute, but under the laws of the State of Texas Brumley is not guilty

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[3] Brumley again points out that the Government continues to insinuate that Brumley committed bribery or Hobbs Act conduct. Opp. 8-9. The Superseding Indictment did not charge Brumley with bribery or Hobbs Act conduct. App. 1a-23a; *see also*, Pet. 5, 13-14.

of fraudulent conduct. It is inconsistent with the Tenth Amendment for the federal government to deem a public sector employee's conduct fraudulent in circumstances where the state does not deem his conduct fraudulent. The fact that Brumley's purely intrastate conduct was not criminally fraudulent under state law means that the mail or wires were not used to perpetrate any fraud. Congress' Commerce Clause power to pass laws which override state mandated punishments for public sector employee misconduct should be externally limited by the Tenth Amendment in circumstances where the federal interest is remote and irrelevant. Here, the remoteness of federal jurisdiction is indicated when the unanimous panel vacated the wire fraud convictions because there was no evidence that Brumley even knew he was involving interstate wires.[4] *United States v. Brumley*, 59 F.3d 517 (5th Cir. 1995), Pet. App. 1a-13a. *Brumley I* should signal this Court that in the instant case the Tenth Amendment and the Commerce Clause are in tension because here the extent to which Texas chooses to punish its employees dramatically conflicts with a Commerce Clause based criminal statute's range of punishment.

The Superseding Indictment Did Not Charge That Brumley Received Money Because He Was A State Employee

5. The Government does not dispute that the Superseding Indictment only charges Brumley with violating rules and misdemeanor law which direct him not to borrow, fraternize, or request help from attorneys who practice before the IAB. *See* Superseding Indictment, App. 1a-23a. As previously pointed out, § 36.08, Tex. Penal Code is a misdemeanor which complements the IAB ethics code and neither require a fraudulent *mens rea*. *Compare* § 36.02, Tex. Penal Code (bribery). App. 24a-26a. The Superseding Indictment did not charge that Brumley received any money because he was a state employee, and there is no proof that any person

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[4] The *Brumley I* panel included Judge Wood from the Seventh Circuit.

"loaned" money to Brumley because he was a state employee. Had this been a bribery or Hobbs Act indictment, objective proof of criminal activity would have been required and the issue of subjectively characterizing Brumley's receipt of the money as fraudulent would not exist in a vacuum; but since it was not, this issue needs to be addressed by this Court. The only other circuit which has addressed this issue strongly indicates that conduct involving a fraudulent *mens rea* is required to underpin a § 1346 corruption case against a state official. *United States v. Sawyer*, 85 F.3d 713, 728-729 (1st Cir. 1996). Since the Superseding Indictment did not charge any conduct requiring a fraudulent *mens rea*, the Fifth Circuit erred in affirming the conviction on a theory not alleged in the indictment. *McCormick v. United States*, 500 U.S. 257 (1991); *United States v. Sutherland*, 665 F.2d 1181 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982).

This Court Needs To Revisit The Honest Service Doctrine

6. In *McNally v. United States* this Court held that the mail and wire fraud statutes were limited by their literal wording. *McNally v. United States*, 483 U.S. 350 (1987). When this Court granted certiorari in *McNally*, all circuits were inconsistently and unevenly expanding the Honest Service Doctrine. The enactment of the minimally worded § 1346 has done nothing to alleviate the uneven expansion of honest services law in the public and private sectors. The Fifth Circuit's holding in *Brumley* should occasion this Court to revisit the concept and scope of the Honest Service Doctrine as now codified in 18 U.S.C. § 1346.

CONCLUSION

The petition for writ of certiorari should be granted as to the questions presented.

Respectfully submitted,

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APPENDIX A

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EASTERN DISTRICT OF TEXAS
DAVID J. MALAND, CLERK
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	NO. 1:93-CR-110-1
	§	
MICHAEL BRYANT BRUMLEY	§	

SUPERSEDING INDICTMENT

THE UNITED STATES GRAND JURY CHARGES:

A. INTRODUCTION

1. **MICHAEL BRYANT BRUMLEY,** Defendant herein, began serving as a Prehearing Examiner for the Texas Industrial Accident Board (IAB) on or about July 1, 1976, and remained in that position until he became a Regional Director on or about June 1, 1988.

2. While serving as a Prehearing Examiner and Regional Director of the Industrial Accident Board, **MICHAEL BRYANT BRUMLEY,** (sometimes referred to as **"BRUMLEY"** herein), had occasion to preside over workers' compensation claims and cases in the Southeast Texas Region, including but not limited to the counties of Anderson, Angelina, Austin, Brazoria,

Brazos, Burleson, Chambers, Cherokee, Fort Bend, Freestone, Galveston, Grimes, Hardin, Houston, Jasper, Jefferson, Leon, Liberty, Limestone, Madison, Montgomery, Nacogdoches, Navarro, Newton, Orange, Panola, Polk, Robertson, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, Tyler, Walker, Waller, and Washington.

3. As a part of his duties, **BRUMLEY** was authorized to review claims of "on the job injuries" made by claimants under the provisions of Texas Workers' Compensation Law, generally found in Articles 8306 through 8390h of Vernon's Annotated Civil Statutes.

4. **BRUMLEY,** when serving as a Prehearing Examiner, or when serving in that role while holding the position of Regional Director, reviewed claims, made findings and recommendations for the Industrial Accident Board (IAB), resolved medical payment disputes, reviewed and approved Compromise Settlement Agreements (CSA's), reviewed and approved attorneys' fees, scheduled and rescheduled prehearing conferences, was responsible for enforcing IAB rules at the prehearing conference level, and was responsible for identifying any frauds on the IAB or violations of IAB rules apparent to an experienced hearing examiner.

5. As an employee of the citizens of the State of Texas, **MICHAEL BRYANT BRUMLEY** was obligated to follow the laws of the State of Texas, the rules and standards of conduct of the Texas Industrial Accident Board (later known as the Texas Workers' Compensation Commission, "TWCC"), and to provide the public, claimants, and insurance companies, the intangible right of good and honest service.

6. The Industrial Accident Board (IAB) functioned under statutes and a system commonly referred to as "old law cases" through 1989-90, when the Texas Legislature radically modified the workers' compensation claims process, to include a substan-

tial change or diminishment of the role of attorneys in the claims process. The amended law created what are commonly referred to as "new law cases."

7. Under the "old law," the Industrial Accident Board interacted primarily with three groups of individuals or companies:

(a) Workers' compensation claimants;

(b) Attorneys at law representing many claimants; and,

(c) Insurance companies providing coverage for workers' compensation claims for employers, including the carriers' representatives, who were at times attorneys at law.

Additionally, medical care providers and employers had a role in the workers' compensation system.

8. The attorneys at law representing workers' compensation claimants are commonly referred to as "plaintiffs' lawyers," "the plaintiffs' bar," or at times "personal injury attorneys."

9. The insurance companies insuring employers on IAB matters are commonly referred to as "carriers." Attorneys representing insurance companies are commonly referred to as "insurance defense lawyers" or "the insurance defense bar."

10. As a State employee, **BRUMLEY** had occasion to meet numerous members of "the plaintiffs' bar, " and numerous insurance carrier representatives, sometimes including members of "the insurance defense bar."

11. On or about August 15, 1990, at or near the time when the "new law" went into effect, the Texas Industrial Accident Board was being reorganized into the Texas Workers' Compensation Commission (TWCC), and **MICHAEL BRYANT BRUMLEY** was promoted to Regional Associate Director of the TWCC.

12. Prior to this time, **BRUMLEY** resided in the Beaumont, Texas, area; however, upon his promotion to Regional Associate Director, **BRUMLEY** moved to The Woodlands, near Houston, Texas. **BRUMLEY'S** promotion included a transfer to the TWCC Regional Office in Houston, Texas.

13. After 1991, the TWCC still handled "old law cases" for claims which involved injuries or illnesses prior to the effective date of the amendments described above.

14. As Regional Associate Director, **BRUMLEY** continued to have responsibility for "old law claims" in most of the counties mentioned in Paragraph 2 above, as well as other counties in his region of responsibility. He was also responsible for identifying attorneys and insurance carriers who failed to follow TWCC or IAB rules and regulations.

15. **BRUMLEY,** at all times during his employment with the IAB and TWCC, had knowledge of sensitive information, including unrepresented claimants, allegations of wrongful conduct made by claimants against their attorneys, as well as other important compensation process matters. Additionally, when claimants attended prehearing conferences without the benefit of counsel, the Prehearing Examiner was frequently asked to refer unrepresented claimants to attorneys. **BRUMLEY** was frequently in such a referral position.

16. During the time period described above, **MICHAEL BRYANT BRUMLEY** served a term on the City of Beaumont Planning and Zoning Commission. After this term on the Planning and Zoning Commission, **BRUMLEY** was elected to the City Council of Beaumont, Texas, and in effect, held two (2) distinct position of public trust—IAB employee and City Councilperson.

17. During this period of time described in the preceding paragraphs, **BRUMLEY** began to expend more funds than his family income, including the use of funds to support a lifestyle

inconsistent with the amount of his family income.

18. As an example of the conduct described in Paragraph 17, **MICHAEL BRYANT BRUMLEY,** began to financially support activities associated with an extramarital affair he maintained with a fellow employee. He also used State funds to further this relationship. **BRUMLEY** desired to further this relationship, therefore he provided improper "inside information" to this employee in order to enhance her chances of promotion with the TWCC. **BRUMLEY** accomplished this improper and dishonest conduct for the purpose of furthering his relationship with the female co-employee, and at the expense of other TWCC employees who were qualified for the position. Portions of the paperwork associated with her promotion and documents associated with the improper use of State funds were sent through the United States mails.

19. **BRUMLEY's** need for income and cash were enhanced by poor business investments he participated in, including a parking lot/street sweeping business in Beaumont, Texas.

20. Holding multiple positions of trust during this period—State employee, Planning and Zoning Commissioner, and City Councilperson—**BRUMLEY** knew he possessed positions vesting him with authority to influence and affect the lives of other persons.

21. JOHN M. CELY, was during the period described in this Introduction, a Attorney at Law in Texas, whose practice primarily can be described as a "plaintiffs' practice," representing large numbers of workers' compensation claimants.

22. Each of the attorneys referred to in **Section B** herein can be generally characterized as "plaintiffs' lawyers" or members of "the plaintiffs' bar" as a result of the nature of their law practice.

23. In order to avoid the naming of attorneys not charged with criminal conduct herein or elsewhere in this matter, the attorneys referred to herein will be identified as "Attorney Number 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 or 11," save and except JOHN M. CELY, who was a co-conspirator with **BRUMLEY** not indicted in this same case.

B. ADDITIONAL RELEVANT FACTS

Relevant to all or portions of this Indictment are the following facts:

1. **MICHAEL BRYANT BRUMLEY** began as early as 1982 approaching members of "the plaintiffs' bar," who were required to appear before **BRUMLEY** in his role as Prehearing Examiner, seeking loans, loan arrangements or other benefits from these attorneys;

2. These attorneys were in the posture of knowing that **MICHAEL BRYANT BRUMLEY** held a position which could affect the manner in which their practice of workers' compensation law developed and/or progressed before the IAB or TWCC;

3. **BRUMLEY** knew the solicitation of funds, loans or other benefits from attorneys practicing before him created a conflict of interest, and was a violation of IAB and TWCC policy, as well as Texas law;

4. During the period described, **BRUMLEY** had poor personal credit ratings, and knew that his credit ratings with lending institutions were not only poor, but worsening as time progressed.

5. In the time period 1982-83, **BRUMLEY** approached Attorney Number 1 and requested that he assist **BRUMLEY** in obtaining a loan at a Beaumont area financial institution which had a relationship with Attorney Number 1. The lawyer made the introduction of **BRUMLEY** to an officer of the financial insti-

tution. **BRUMLEY** then borrowed approximately $1,000.00 from the institution. In the time thereafter, **BRUMLEY** defaulted on the loan and was told he needed to obtain the funds to repay the loan, since savings and loan examiners had questioned the failure of **BRUMLEY** to pay off the loan. **BRUMLEY** asked Attorney Number 1 if he could assist **BRUMLEY** in locating another institution where a loan could be obtained to repay the loan described in the preceding sentences of this paragraph. In other words, **BRUMLEY** wanted to substitute one loan for another loan, again through the assistance of Attorney Number 1. Attorney Number 1 thereafter called Attorney Number 2 and inquired if the lending institution Attorney Number 2 represented could loan **BRUMLEY** the money.

6. Attorney Number 2 contacted a lending institution outside the Beaumont, Texas, area where Attorney Number 2 knew the bank personnel, and arranged for **BRUMLEY** to pursue a loan. After the bank officer met with **BRUMLEY**, he called Attorney Number 2 and stated that **BRUMLEY's** credit was so poor that the bank could not loan **BRUMLEY** the funds without a guarantor. Attorney Number 2 guaranteed the note on behalf of **BRUMLEY**, and the loan was made, with the proceeds being used to pay-off the first loan referred to in Paragraph Number 5. This occurred on or about September 17, 1985.

7. Once again, **BRUMLEY** defaulted on the loan, failing to make substantial payments. Attorney Number 2 was required to pay off the loan he had guaranteed, and payment was made on or about August 25, 1986, with the sum of $1,839.51 being paid by Attorney Number 2. Attorney Number 2 never collected the sums from **BRUMLEY** which Attorney Number 2 paid for the benefit of **BRUMLEY.**

8. On or about a date in July or August of 1985, **MICHAEL BRYANT BRUMLEY** contacted Attorney Number 3 and stated that **BRUMLEY's** family would be with him in the

Lufkin, Texas, area while **BRUMLEY** handled Prehearing Conferences for the State of Texas. **BRUMLEY** further stated that he wanted to see if he could use Attorney Number 3's membership at Crown Colony Country Club, so that **BRUMLEY's** daughters could swim during their stay in Lufkin. At this time, **BRUMLEY** knew Attorney Number 3 was required to appear before **BRUMLEY** for Prehearing Conferences. Attorney Number 3 authorized **BRUMLEY** to use the attorney's membership at Crown Colony Country Club in Lufkin, Texas. **BRUMLEY** charged approximately $324.42 in expenses to Attorney Number 3's membership card and failed to repay Attorney Number 3, and he did not offer to repay the Attorney for the expenditures. Attorney Number 3 paid the sum on behalf of **BRUMLEY** on or about September 11, 1985.

9. Approximately one year later, **BRUMLEY** again called Attorney Number 3 and made the same type of request as the one described in paragraph B-8. The attorney agreed and **BRUMLEY** charged $299.60 to the country club membership of Attorney Number 3. **BRUMLEY** never repaid that sum nor did he offer to repay the charges. Attorney Number 3 paid $299.60 on behalf of **BRUMLEY** on or about August 29, 1986. In both instances the attorney was required to pay the country club expenses.

10. On or about October 9, 1986, after having charged a total of $624.02 to Attorney Number 3's country club account, and having failed to reimburse the attorney for those charges, **BRUMLEY** approached the same attorney and asked for a personal loan. Attorney Number 3 prepared a written note which was signed by **MICHAEL BRYANT BRUMLEY** in the principal amount of $500.00, accruing interest at the rate of ten percent (10%) per annum. The sum was paid to **BRUMLEY** by check number 5506 on the account of Attorney Number 3 and **BRUMLEY** failed to repay any portion of the loan. The attorney did not demand payment, and as time passed, the attorney discovered the loan was a violation of IAB rules and

never made any effort to collect the sums.

11. Beginning in 1984, **BRUMLEY** began approaching Attorney Number 4, who practiced law in Beaumont, Texas, requesting loans or assistance with obtaining bank loans. This attorney practiced before the IAB while **BRUMLEY** was a Prehearing Examiner. Attorney Number 4 and **BRUMLEY** also developed a social friendship. Each time **BRUMLEY** approached Attorney Number 4 for money, **BRUMLEY** provided some financial excuse which rationalized his "need" for the loan. **BRUMLEY** provided excuses such as car repairs, home repairs, or illness or a death in his or his wife's family. Thereafter, Attorney Number 4 made or arranged for loans on or about the following dates for **BRUMLEY**, and in the following amounts:

Date	**Amount**
May 19,1987	$ 1,390.00
November 12, 1987	$ 800.00
February 19, 1988	$ 1,500.00
August 18, 1988	$ 450.00
TOTAL	$ 4,140.00

These loans listed above were never repaid by **BRUMLEY** to Attorney Number 4.

12. On or about a date in December of 1987 or early January, 1988, **BRUMLEY** approached Attorney Number 4 for a loan, and Attorney Number 4 counseled **BRUMLEY** about his lifestyle and lack of financial stewardship. Attorney Number 4 referred **BRUMLEY** to a bank in Beaumont, Texas, thinking **BRUMLEY** would feel a greater obligation to repay a lending institution than an individual. When the bank officer reviewed the credit of **BRUMLEY**, he required a guaranty or co-signature by Attorney Number 4. The attorney instructed the bank not to notify **BRUMLEY** of the guaranty arrangement, in the hope that **BRUMLEY** would not default on the loan to a finan-

cial institution, if he thought he was the sole responsible party. **BRUMLEY** paid a portion of the loan balance, but defaulted on the loan, which caused Attorney Number 4 to be required to pay the balance of approximately $747.60.

13. In August of 1987, several loans were renewed and one new loan was made by a bank in Jasper County, Texas. **BRUMLEY** had approached Attorneys 5 and 6 respectively, and requested them to arrange loans, and if necessary to co-sign or guarantee loans for **BRUMLEY**. At that time, at least one, if not both of these attorneys or members of their firms were, like other attorneys mentioned above, required to practice before **BRUMLEY** at the Industrial Accident Board when they represented workers' compensation claimants. When **BRUMLEY** eventually defaulted on the loans, Attorneys 5 and 6 were required to pay a total of approximately $12,088.00 to repay **BRUMLEY's** debts, since they had guaranteed the loans to the bank. Attorney Number 5 made an effort to collect monies from **BRUMLEY**, and even requested **BRUMLEY** to pay a token amount each month, just to be in a position to be making some progress toward repayment of his debts. **BRUMLEY** failed to repay the debts, and stated to the bank that he would be inheriting portions of an estate in Many, Louisiana, which could pay the debts. This statement was false.

14. In or around 1987, **BRUMLEY** approached an attorney, hereinafter referred to as Attorney Number 7, from Nacogdoches, Texas. He requested a loan or assistance in obtaining a loan from a lending institution in Nacogdoches County, Texas. The attorney arranged for **BRUMLEY** to obtain the loan at a lending institution; however, the attorney's assurance of payment was required by the financial institution. **BRUMLEY** defaulted on the loan. The loan was paid off on or about March 14, 1988, after **BRUMLEY's** default. The sum paid was $2,100.00. Once again, Attorney Number 7 practiced in front of the IAB and **BRUMLEY**, who was a Prehearing Examiner.

15. Attorney Number 8 practiced law in the Beaumont, Texas area and was approached by **BRUMLEY** several times for personal loans. On or about a date in 1984, Attorney Number 8 was first approached, and **BRUMLEY** requested a personal loan either from the attorney, or assistance in obtaining a loan at the bank which the attorney served as a Director. Attorney Number 8 contacted the bank to assist **BRUMLEY** in obtaining a loan. Apparently failing to do a credit check, the bank funded a $1,000.00 loan to **BRUMLEY**, but once the bank examined **BRUMLEY's** credit, Attorney Number 8 was notified. Attorney Number 8 informed the bank he would "back the loan." **BRUMLEY** defaulted on the loan and Attorney Number 8 agreed to pay off the $1,000.00 loan. Thereafter, Attorney Number 8 obtained the signature of **BRUMLEY** on a promissory note to the attorney's firm, for $1,000.00, dated December 17, 1987. **BRUMLEY** never repaid the attorney or his firm. **BRUMLEY** continued to approach Attorney Number 8, and the last occasion he approached Attorney Number 8 was in or around a time in the late spring or summer of 1992.

16. In or around a date in 1988, **BRUMLEY** approached the law partner of Attorney Number 8 while that attorney (Number 8) was apparently out of town. **BRUMLEY** approached Attorney Number 9, and stated the City Council was taking a trip to the Far East, and that the City of Beaumont was paying for **BRUMLEY's** trip, but **BRUMLEY** desired to take his wife on the trip. Attorney Number 9 permitted **BRUMLEY** to sign a promissory note to the law firm for $1,500.00, and the monies were advanced to **BRUMLEY**. **BRUMLEY** never repaid the loan.

17. In the year 1987, **MICHAEL BRYANT BRUMLEY** approached JOHN M. CELY, an attorney in the Lufkin, Texas, area. **BRUMLEY** solicited funds from CELY and CELY consented to make payments, beginning by giving **BRUMLEY** sums of money, including payments from CELY's law firm. At that time, CELY had developed and was further developing a

large personal injury practice, with a large segment of the practice devoted to workers' compensation cases. CELY, and others associated in law practice with CELY, as well as CELY employees, were appearing before **BRUMLEY** in Prehearing Conferences.

18. Eventually, **BRUMLEY** and CELY began a process in which Cely had his employees deliver checks to the local Western Union agent, primarily making the checks payable to the H.C. Walker, Escrow Account. H.C. Walker is the Western Union agent in downtown Lufkin, Texas. The checks were generally made for an amount approximately $50.00 more than the desired wire transfer CELY would send to **BRUMLEY**. The $50.00 payments were the wire transfer fees for the service of conveying funds by electronic wire to a second location. All wire transfers from Western Union locations in Texas are communicated by an electronic network to a location outside the State of Texas. If the "pick-up" location is within Texas, the funds are then wired back into Texas, to the pick-up location.

19. JOHN M. CELY wired funds to various locations in Texas, where **MICHAEL BRYANT BRUMLEY** would pick up the funds. At times, **BRUMLEY** would convert the transferred funds to United States currency immediately, and at other times, he would wait to convert the funds at another location or deposit the transferred funds. Generally the funds were converted to cash.

20. More than seventy (70) wire transfers were made to **BRUMLEY** by CELY's employees, and specifically at the direction of JOHN M. CELY. Approximately $4,250.00 in wire transfer fees were incurred by CELY during a period beginning in 1987 to May of 1992, for the transfer of funds to **BRUMLEY**.

21. **MICHAEL BRYANT BRUMLEY** received approximately $86,730.00 in funds, cash, checks and wire transfers from CELY during the period July, 1987 through May of 1992. No written

"loan agreements" were executed between CELY and **BRUMLEY**, and neither could acknowledge any idea of how much had been paid to **BRUMLEY** by the latter part of 1992. **BRUMLEY** never repaid any sums to CELY.

22. In May of 1992, CELY authorized the delivery of a check to **BRUMLEY** for $400.00, which stated on its face "repay loan from earned fees."

23. During the period of 1987 through 1992, **BRUMLEY** showed favoritism to CELY in the manner in which CELY's cases were handled by the IAB procedurally. **BRUMLEY** ignored obvious or known IAB violations by CELY, and on one occasion even arranged for Prehearing Conferences to be held at CELY's law office, contrary to IAB practices. Other IAB personnel recognized the impropriety and cancelled the location of those hearings. **BRUMLEY** also improperly influenced lease negotiations for office space in the Lufkin, Texas area when the TWCC sought to open an office in Lufkin. In fact, **BRUMLEY** attempted to obtain the lease of TWCC space for the benefit of his co-conspirator, JOHN M. CELY.

24. In November of 1992, JOHN M CELY became aware of a Federal Investigation of him, as well as questions regarding his use of wire transfers. Within one (1) week after CELY acquired this knowledge, he instructed members of his staff to send wire transfers to **BRUMLEY** in their personal names, rather than the law firm name. This was true even though the funds were in actuality sent by CELY to **BRUMLEY**.

25. CELY did not maintain the integrity of client trust funds, and at times the funds of clients were so commingled that client trust funds were mixed with accounts in which payments were being made to **BRUMLEY** from commingled client trust funds and law firm operating monies.

26. During this period of 1987 through May of 1992, CELY frequently "operated" the law office "in absentia", simply calling in at times and giving employees instructions to wire **BRUMLEY** money, usually when **BRUMLEY** requested the monies.

27. While **BRUMLEY** continued to receive these funds from CELY on a regular basis, **BRUMLEY** continued to expend funds at an extraordinary rate for his actual State employee income.

28. In the spring/early summer of 1992, **BRUMLEY** approached Attorney Number 10 in the Beaumont, Texas, area. (**BRUMLEY** had previously asked Attorney Number 10 to assist him in arranging a loan at a financial institution in Jefferson County, Texas.) **BRUMLEY** produced a document which appeared to be an Internal Revenue Tax Lien, and stated he needed funds to pay off this Tax Lien. When the attorney agreed to assist him, a check was written for $2,100.00 and a promissory note produced. **BRUMLEY** signed the note but stated the IRS would seize any funds he might deposit, and insisted the check be converted to United States currency. **BRUMLEY** never repaid the loan.

29. During the period of 1992 until the present, **BRUMLEY** approached personal friends and associates for other loans, some of which were arranged, and some of which were not provided. However, from the eleven (11) attorneys listed in the preceding paragraphs (which includes Cely), **MICHAEL BRYANT BRUMLEY** received, and failed to repay, approximately $112,156.03 in funds (not counting all of the interest and penalties which have accrued).

30. On or about April 13, 1992, **MICHAEL BRYANT BRUMLEY** wrote to an attorney who was either required to appear before **BRUMLEY**, or members of that attorney's firm were required to appear before the TWCC, and asked the attorney to provide legal assistance to **BRUMLEY** on a traffic ticket

issued to **BRUMLEY** by the Texas Department of Public Safety. **BRUMLEY** made the request on official State of Texas letterhead stationery, and made no mention of paying a fee for this service.

COUNT 1

VIOLATION: 18 U.S.C. § 371 (Conspiracy)

PENALTY: A fine of not more than $250,000.00, imprisonment of not more than five (5) years, or both. A term of supervised release of not more than three (3) years. A special assessment of $50.00.

Paragraphs A-1 through 23 and B-1 though 30 of the Introduction to this Indictment are hereby realleged and incorporated for all necessary purposes as if fully set forth herein.

From on or about a date in 1987, the exact date unknown to the Grand Jury, and continuing to on or about a date in June of 1992, in the Eastern District of Texas and elsewhere, **MICHAEL BRYANT BRUMLEY,** Defendant herein, and JOHN M. CELY did knowingly, willfully, and unlawfully combine, conspire, confederate, and agree together and with others, both known and unknown to the Grand Jury, to commit offenses against the United States, namely:

(a) to defraud by scheme and artifice the citizens of the State of Texas, including members of the Texas Industrial Accident Board (and its successor, the TWCC), an agency of the State of Texas, from receiving the intangible right to honest services, and in so doing conspired to use interstate wire and radio communications in violation of Title 18, United States Code, Sections 1343 and 1346, and

(b) to defraud by scheme and artifice the citizens of the State of Texas, including members of the Texas Industrial Accident Board (and its successor, the TWCC), an agency of the State of Texas, from receiving the intangible right to honest services, and in so doing conspired to use the United States mails in the scheme, in violation of Title 18, United States Code, Section 1341 and 1346.

MANNER AND MEANS TO ACCOMPLISH THE OBJECTS OF THE CONSPIRACY

1. It was a part of the conspiracy for **BRUMLEY** and CELY to commit the relevant alleged acts described in the Introduction to this Indictment.

2. It was part of the conspiracy that Defendant, **MICHAEL BRYANT BRUMLEY**, and co-conspirator JOHN M. CELY, having devised a scheme and artifice to defraud the citizens of Texas of honest service, specifically through the administration of the workers' compensation system, and acting with intent to defraud the State of Texas, arranged the transfer of critical IAB documents through the mails, at a time when **BRUMLEY** was failing to fulfill his proper obligations for the State in relation to certain workers' compensation administrative matters, claims and complaints;

3. It was a part of the conspiracy and scheme and artifice described in this Count, that JOHN M. CELY, or employees of Cely acting at his direction, would wire funds in interstate commerce to **MICHAEL BRYANT BRUMLEY**;

4. It was a further part of the conspiracy and scheme and artifice to use the names of third persons, beginning in November of 1991 and continuing through April of 1992, to transfer funds from CELY to **BRUMLEY**, in order to avoid the detection of the scheme;

5. It was a part of the conspiracy and scheme and artifice described in this count, that **MICHAEL BRYANT BRUMLEY** used the United States mails to send documents in furtherance of the conspiracy.

6. It was a further part of the scheme for **BRUMLEY** to use his official position as a State employee to attempt to provide favoritism to CELY and to use his public office for personal gain.

OVERT ACTS

In furtherance of the conspiracy, and to affect the objects thereof, the following overt acts, among others, were committed by or caused to be committed by one or more members of the conspiracy, in the Eastern District of Texas and elsewhere.

1. CELY, or employees acting at his direction, transferred funds to **BRUMLEY** by wire on more than seventy (70) occasions.

2. **BRUMLEY** violated IAB and TWCC regulations as well as State law by receiving benefits provided from attorneys to **BRUMLEY**, while the attorneys were practicing before the IAB or TWCC.

3. **BRUMLEY** notified CELY of information pertaining to an impending investigation/audit of CELY by the IAB.

4. The acts described in Paragraphs B-1 through 30 of the Introduction to this Indictment list many overt acts of the Defendant, which are hereby incorporated by reference.

All in violation of Title 18, United States Code, Section 371.

COUNTS 2-4

VIOLATION: 18 U.S.C. § 1343, and further defined by § 1346.
(Wire Fraud)

PENALTY: A fine of not more than $250,000.00; imprisonment of not more than five (5) years, or both. A term of supervised release not to exceed three (3) years. A special assessment of $50.00.

Paragraphs A-1 through 23 and B-1 through 30 of the Introduction to this Indictment are hereby realleged and incorporated as necessary, as if fully set forth herein.

On or about a date in 1982 and continuing until on or about a date in June of 1992, in the Eastern District of Texas and elsewhere, the Defendant, **MICHAEL BRYANT BRUMLEY**, having intentionally and willfully devised the scheme and artifice described in Paragraphs A-1 through 23 and B-1 through 30, to defraud and deprive the citizens of the State of Texas, including the Industrial Accident Board and its successor (the Texas Workers' Compensation Commission), a State agency, of the intangible right to good, faithful and honest service, and thereafter transmitted or caused to be transmitted by means of wire or radio communications in interstate commerce, electronic signals which communicated the transfer of funds by wire, for the purpose of executing such scheme and artifice:

Count	Date of Transfer by Cely	Check Number Used for Wire Payment	Amount (Less Wire Fee)	Location of Pickup by Brumley
2	8-4-89	3640556	$925.00	W.L. Pate Telegraph, Bmt., Texas.
3	9-15-89	3641187	$925.00	W.L. Pate Telegraph, Bmt., Texas.
4	1-3-92	1780834	$925.00	Mail Boxes Etc. #577 The Woodlands, Texas.

All in violation of Title 18, United States Code, Section 1343 and further defined by Section 1346.

COUNTS 5-7

VIOLATION: 18 U.S.C. § 1956 (a) (1) (A) (i) (Money Laundering)

PENALTY: A fine of not more than $500,000.00; imprisonment of not more than twenty (20) years, or both. A term of supervised release of not more than five (5) years. A special assessment of $50.00.

Paragraphs A-1 through 23 and B-1 through 30 of the Introduction of this Indictment are hereby realleged for all relevant purposes, and incorporated by reference as if fully set forth herein.

On or about the dates set forth below, in the Eastern District of Texas and elsewhere, the Defendant, **MICHAEL BRYANT BRUMLEY,** aided by JOHN M. CELY, did knowingly conduct and attempt to conduct the financial transactions involving monetary instruments and affecting interstate commerce, listed below which involved the proceeds of the specified unlawful activity, that is, wire fraud, in violation of Title 18, United States Code, Section 1343, as described above in Counts 2, 3 and 4 respectively, with the intent to promote the carrying on of the specified unlawful activities, and that while conducting and attempting to conduct such financial transactions, to wit: The cashing of wire transfer funds or deposit of said funds at financial institutions as set forth below, affected interstate commerce and the Defendant knew that the property involved in the financial transactions represented the proceeds of some form of unlawful activity as described below:

Count	Date of Financial Transaction	Specified Unlawful Activity	Amount	Financial Institution
5	8-4-89	Count 2	$925.00	Beaumont Bank.
6	9-15-89	Count 3	$925.00	Beaumont Bank.
7	1-3-92	Count 4	$925.00	First City Bank The Woodlands, TX

All in violation of Title 18, United States Code, Section 1956 (a) (1) (A) (i).

COUNT 8

VIOLATION: Title 18 U.S.C. § 1014 (False Statement to a Financial Institution)

PENALTY: A fine of not more than $250,000.00; imprisonment of note more than two (2) years, or both. A term of supervised release of not more than one (1) year. A special assessment of $50.00.

1. In June of 1988, and at all times relevant herein, First Interstate Bank of Texas, N.A. of Beaumont, Texas, was a financial institution with deposits insured by the Federal Deposit Insurance Corporation (or its successor).

2. On or about a date in June of 1988, in the Eastern District of Texas, the Defendant, **MICHAEL BRYANT BRUMLEY**, did knowingly and intentionally make a material false statement to First Interstate Bank of Texas, N.A. for the purpose of influencing said financial institution to make the Defendant one or more loans or loan renewals, and did in fact obtain one or more loan renewals from said institution.

All in violation of Title 18, United States Code, Section 1014.

COUNT 9

VIOLATION: Title 18 U.S.C. § 1014 (False Statement to a Financial Institution)

PENALTY: A fine of not more than $250,000.00; imprisonment of note more than two (2) years, or both. A term of supervised release of not more than one (1) year. A special assessment of $50.00.

1. From on or about a date in September of 1986 until on or about a date in June of 1988, and at all times relevant herein, Parkdale Bank of Beaumont, Texas, was a financial institution with deposits insured by the Federal Deposit Insurance Corporation (or its successor).

2. From on or about a date in September 1986 until on or about a date in June 1988, in the Eastern District of Texas, the Defendant, **MICHAEL BRYANT BRUMLEY**, did knowingly and intentionally make material false statements to Parkdale Bank for the purpose of influencing said financial institution to make the Defendant one or more loans or loan renewals, and did in fact obtain loans and loan renewals from said institution.

All in violation of Title 18, United States Code, Section 1014.

A TRUE BILL,

/s/illegible
FOREMAN OF THE GRAND JURY

RUTH HARRIS YEAGER
UNITED STATES ATTORNEY

/s/illegible
Assistant United States Attorney

L. STUART PLATT
Assistant United States Attorney

CAROL K. JOHNSON
Assistant United States Attorney

APPENDIX B

Texas Penal Code § 36.02. Bribery

(a) A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:

(1) any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

(2) any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion in a judicial or administrative proceeding; or

(3) any benefit as consideration for a violation of a duty imposed by law on a public servant or party official.

(b) It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office or he lacked jurisdiction or for any other reason.

(c) It is no defense to prosecution under this section that the benefit is not offered or conferred or that the benefit is not solicited or accepted until after:

(1) the decision, opinion, recommendation, vote, or other exercise of discretion has occurred; or

(2) the public servant ceases to be a public servant.

(d) An offense under this section is a felony of the second degree.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1975, 64th Leg., p. 915, ch. 342, § 11, eff. Sept. 1, 1975; Acts 1983, 68th Leg., p 3237, ch. 558, § 2, eff. Sept. 1, 1983.

For saving provisions see note set out under Section 1.07.

For applicability of change in law made by 1983 amendatory act to offenses committed before effective date of act, see note under § 36.01.

APPENDIX C

Texas Penal Code § 36.08.
Gift to Public Servant by Person Subject to His Jurisdiction

(a) A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

(b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency.

(c) A public servant in an agency carrying on civil or criminal litigation on behalf of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.

(d) A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.

(e) A public servant who has judicial or administrative authority, who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decision, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.

(f) A public servant who is a member of or employed by the legislature or by an agency of the legislature commits an offense if he solicits, accepts, or agrees to accept any benefit from any person.

(g) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1975, 64th Leg., p. 915, ch. 342, § 11, eff. Sept. 1, 1975; Acts 1983, 68th Leg., p. 3238, ch. 558, § 5, eff. Sept. 1, 1983.

For saving provisions see note set out under Section 1.07.

For applicability of change in law made by 1983 amendatory act to offenses committed before effective date of act, see note under § 36.01.